No. 87-852

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

UNION OIL COMPANY OF CALIFORNIA,
Petitioner,

v.

SIERRA CLUB,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

The Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*, prohibits any person from discharging pollutants into waters of the United States without a permit. 33 U.S.C. § 1311. A permit limits the type and quantity of pollutants that may be discharged. In addition, a permit requires the permittee to report monthly on the monitoring of pollutants in its discharge.

1. Does the Clean Water Act allow a permittee to be excused for exceeding its permit limits where extreme and unusual acts of nature caused the exceedance?

2. Does the Clean Water Act prohibit a permittee from introducing evidence showing that an analytical result contained in its monthly monitoring report was erroneous?

RULE 28.1 LISTING

1. UNOCAL CORPORATION is the parent company of UNION OIL COMPANY OF CALIFORNIA.

2. UNION EXPLORATION PARTNERS, LTD. is a partnership involving UNION OIL COMPANY OF CALIFORNIA.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Union Oil Company of California (Union Oil), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on April 3, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 813 F.2d 1480 (1987) and is reprinted in Appendix (App.) A. The Court of Appeals on August 20, 1987 denied Union Oil's timely petition for rehearing in an unpublished order which is reprinted in App. B.

The District Court for the Northern District of California (Conti, J.) entered judgment in favor of Union Oil based on Findings of Fact and Conclusions of Law which are unpublished.

The Findings of Fact and Conclusions of Law are reprinted in App. C. The Judgment is reprinted in App. D.

JURISDICTION

Sierra Club brought suit in the District Court alleging jurisdiction under the Clean Water Act, 33 U.S.C. § 1365. Following a five-day court trial, the District Court entered judgment in favor of Union Oil on November 5, 1985. Sierra Club appealed, and the Court of Appeals reversed in part, affirmed in part, and remanded on April 3, 1987. A timely petition for rehearing was denied on August 20, 1987. The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 505 of the Clean Water Act, 33 U.S.C. § 1365, provides in pertinent part:

> Citizen Suits
>
> (a) Authorization; jurisdiction
>
> Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf—
>
> (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation[.]
>
> * * * *
>
> The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an

order, . . . and to apply any appropriate civil penalties under section 1319(d) of this title.

* * * *

(f) Effluent standard or limitation

For purposes of this section, the term "effluent standard or limitation under this chapter" means . . . (6) a permit or condition thereof issued under section 1342 of this title. . . .

Other pertinent statutory and regulatory provisions are reprinted in App. E and App. F.

STATEMENT OF THE CASE

Union Oil operates an oil refinery near Rodeo, California, outside San Francisco. Normal refinery operations generate wastewater which must be treated before discharge. The wastewater consists of three components:

1. process wastewater, containing oil and other constituents;
2. sanitation wastes from sinks and toilets at the refinery; and
3. stormwater runoff.[1]

App. at A-6. Union Oil applied for and received a permit under the Clean Water Act authorizing it to discharge its treated wastewater into San Pablo Bay.[2]

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[1] The plant also discharges water drawn from San Pablo Bay and used to cool refinery equipment. This water does not come into contact with oil or other contaminants. Most of this noncontact cooling water is discharged through a separate outfall. The discharge of this noncontact cooling water is not at issue here. App. at A-6.

[2] Union Oil first received a permit in 1974. That permit was amended in 1977 and 1979, and new permits were issued in 1980 and 1985. App. at A-7 and A-27. The differences between the permits are not relevant here and the petition will refer to all of these permits jointly as the "permit."

Similarly, the statutory and regulatory references here are to those appearing in the current U.S. Code, California statutes and Code of Federal Regulations. Any changes in these provisions since 1979, the

Union Oil's permit limits the pollutants that may be present in its wastewater discharge. The permit limits are based primarily on the regulations promulgated by the United States Environmental Protection Agency (EPA): Effluent Limitations for Petroleum Refining Point Source Category, 40 C.F.R. Part 419. The EPA regulations set limits based on the level to which oil refineries can clean their wastewater if they use the best practicable control technology available. The permit also includes limits drawn from water quality standards set by the State of California. Unlike the federal technology-based limits, the water quality standards relate to ambient criteria for various bodies of water in the State.[3] 33 U.S.C. § 1342, App. at A-37-40.

Union Oil's permit sets daily and monthly numerical limits on the discharge of ten pollutants, such as phenols, chromium, and oil and grease. The permit provides additional allowance for four pollutants, including total suspended solids and oil and grease, depending on the amount of stormwater runoff.[4] In addition, the permit requires Union Oil to submit monitoring reports every month on the sampling and analysis of its treated wastewater discharge. Def. Ex. Q.

To meet its permit terms, Union Oil segregated its waste streams into two categories and treated them differently. The stream containing a high concentration of pollutants received pretreatment, one or two types of biological treatment, then final biological treatment in an activated sludge system known as the bioplant.[5] App. at A-6-7. The other stream, containing the low

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[3] The State of California issued the permit to Union Oil under authority delegated by EPA. While the State of California has primary authority to enforce the permit, EPA also retains authority to enforce it. 33 U.S.C. § 1342, App. at A-37-40.

[4] There was no additional stormwater allowance in the permit for phenols. Most of the alleged violations here were phenols exceedances.

[5] About 90% of the phenols passed through this stream. 3 Tr. at 429-30 (Stone). "Tr." refers to the transcript of the Oct. 28, 1987 trial. The volume number precedes the "Tr." and the page number follows.

concentration wastewaters and all of the stormwater runoff, passed through two treatments to remove oils and solids; to the extent of available capacity in the bioplant, it too passed through the bioplant. App. at A-6-7. Union Oil also installed two storm basins with a total capacity of 9.5 million gallons to store excess flows during storms for later treatment, App. at A-29; the plant was designed to contain and meet its permit terms in storms of a magnitude likely to occur approximately once every ten years. 3 Tr. at 349 (DeBuse).

Severe winter storms hit the San Pablo Bay area both in the winter of 1981-1982 and in the winter of 1982-1983. Rainfall like that occurring during the six-month winter of 1981-1982 constituted a hundred-year rainfall event and, statistically, should not have occurred again in a hundred years. 5 Tr. at 614 (Schroeder). The hundred year storms occurred again the following winter.[6]

Among the generally heavy storms were "vicious individual rain storms." 1 Tr. at 163 (Bottomley). On January 4-5, 1982, seven inches of rain fell in a twenty-four hour period, causing severe flooding at the Union Oil plant for twelve to eighteen hours. 1 Tr. at 164-65 (Bottomley). A rainfall of this duration and severity, referred to as "the killer storm" in the newspapers at the time, 1 Tr. at 164-65 (Bottomley), is statistically expected once in one hundred and sixty years.[7] 5 Tr. at 668 (Franz). Two months later, twelve days of rain dumped eight inches of water at the Union Oil refinery; that rainfall began with an arctic storm, bringing a rare snowfall to nearby Mt. Diablo at levels as low as 2,000 feet. 2 Tr. at 294-95, 3 Tr. at 417 (DeBuse).

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[6] The six-month rainfall in the winter of 1981-1982 amounted to almost thirty-five inches. The six-month rainfall during the winter of 1982-1983 amounted to almost thirty-seven inches. 1 Tr. at 175 (Bottomley). The mean annual rainfall at the refinery is eighteen inches. 3 Tr. at 355 (DeBuse).

[7] The Coast Guard and State personnel told Union Oil that no water treatment installations in the area "were surviving that storm in anything like good condition. Everyone was having trouble." 2 Tr. at 293 (DeBuse).

Despite the pounding rains, the storm basins overflowed only four times. Def. Ex. X. The bioplant, however, was overwhelmed. The storms and dropping temperatures retarded the bacterial activity. 1 Tr. at 164 (Bottomley); 4 Tr. at 455 (Stone). Just as the bacteria recovered from one storm, they suffered another: "The November storms had damaged our bugs pretty badly. They were slow to recover from that. And then the subsequent storm damaged them again." 1 Tr. at 168 (Bottomley).

A year after the last storm, in April 1984, Sierra Club presented written notice to EPA and the State of California, under 33 U.S.C. § 1365(b), of its intent to file a citizen suit against Union Oil if the state or federal governments did not bring an enforcement action for these past violations.[8] Both EPA and the State declined to do so.

On June 4, 1984, the Sierra Club filed this suit under 33 U.S.C. § 1365, charging Union Oil with violating its permit seventy-six times between 1979 and 1983.[9] Fifty of those exceedances had occurred during the two years of severe winter storms. The Sierra Club based its allegations on a review of Union Oil's monthly monitoring reports and associated noncompliance reports, all of which had been properly filed and were publicly available. App. at A-8. Sierra Club sought injunctive relief, civil penalties and attorneys fees.

The District Court bifurcated the issues of liability and damages and, after a five-day court trial on Union Oil's liability, the District Court filed its Findings of Fact and Conclusions of Law (Nov. 5, 1985), App. C. The District Court found that extreme winter rains had caused fifty of the alleged violations:

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[8] Sierra Club's action sought an injunction but alleged only past violations. Union Oil had modified its plant to prevent any recurrence of these exceedances. *E.g.*, 1 Tr. at 171-73 (Bottomley). Whether a citizen suit may be brought only on the basis of alleged violations occurring in the past is an issue currently before this Court in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, No. 86-473.

[9] During the four-and-a-half-year period covered by the suit, Union Oil had submitted 16,000 reportings. App. at A-30. Seventy-six of those 16,000 were at issue below. Fifty-seven are at issue here.

1. "[T]he winters of 1981 to 1982 and 1982 to 1983 produced exceptionally heavy rainfall, causing widespread flooding and property damage." App. at A-31.

2. "[T]he wastewater treatment plant at Union Oil consisted of equipment which met [EPA] standards and which had sufficient capacity to meet permit limitations under all but the most severe circumstances." App. at A-32.

3. "[T]he heavy and extraordinary rains of the winters of 1981-1982 and 1982-1983, caused most of the exceedants at issue." App. at A-31.

4. "[T]he rainfall related permit exceedences were caused by factors beyond the reasonable control of Union Oil." App. at A-32.

The District Court excused those violations as "upsets" under 40 C.F.R. § 122.41(n).[10] Union Oil's permit did not contain an upset provision, but the Court nevertheless applied the upset defense. The Court reasoned that federal law requires the inclusion of upset provisions in all federally-issued permits, *Marathon Oil Company v. Environmental Protection Agency,* 564 F.2d 1253, 1272-73 (9th Cir. 1977), and that California law, in turn, requires application of the federally-mandated provisions unless the State makes specific findings regarding the "water quality" necessity for imposing more stringent requirements. Cal. Water Code § 13377; *Southern California Edison Company v. State Water Resources Control Board,* 116 Cal.App.3d 751 (1981). Because the State had made no such findings, the District Court decided the upset defense applied. App. at A-33.

The District Court further ruled that seven exceedances reflected in Union Oil's monitoring reports did not constitute violations because problems in sampling or laboratory testing had produced invalid indications of the water quality.[11] The evidence

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[10] EPA incorporates upset provisions in all federal permits. The upset provision, 40 C.F.R. § 122.41(n), is reprinted as App. F.

[11] The District Court had counted these invalid sample results together with instances where the permit limit was not exceeded, discuss-

had shown, for example, that two samples had been tainted by debris from a pipe and two others had reacted chemically in the laboratory, nitrifying the samples and invalidating the results. 2 Tr. at 247-53 (DeBuse); 4 Tr. at 547-49 (Jenkins). The Court therefore found that these seven instances did not reflect exceedances or constitute violations. App. at A-31. The District Court then ruled on the remaining issues and entered judgment in favor of Union Oil.

The United States Court of Appeals for the Ninth Circuit reversed the District Court's rulings on these issues. The Court of Appeals held that the District Court erred in allowing Union Oil to raise an upset defense. First, the Court of Appeals reasoned that Union Oil's permit did not contain an upset defense, that the states may set more stringent permit limits by omitting the federal upset defense, and that the state had done so here by not incorporating the upset defense in the permit explicitly or by reference.[12] App. at A-11. Second, the Court of Appeals concluded that even if the upset defense had been available, it could not have been properly applied here. The Court noted that the upset defense is not available for inadequate treatment facilities, 40 C.F.R. § 122.41(n), App. at A-42; and, contrary to the findings of the District Court, the Court of Appeals regarded the facility here as inadequate because it had not functioned properly during the heavy rains.[13] App. at A-16-17.

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ing both categories as 13 alleged exceedances. App. at A-31. The Court of Appeals sorted them into two categories. App. at A-20. This petition deals only with one of the two categories, addressing the seven cases of invalid sample results.

[12] The Court also concluded Union Oil should have been precluded from raising the upset defense in District Court because it had not protested or sought review of its permit terms since its appeal of the original permit in 1974. App. at A-10-11.

[13] The Court of Appeals also decided the District Court misapplied the upset defense because the Court failed to make findings on four procedural showings required of Union Oil and because the upset defense by its terms applies only to EPA technology-based permit exceedances and would not excuse any water quality based exceedances.

Finally, the Court of Appeals held the District Court should not have excused the seven alleged violations based on invalid results due to sampling and laboratory problems because permittees are required to submit accurate reports and may not introduce evidence challenging the accuracy of any of its monitoring reports. App. at A-20-21.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Holding the Permittee Liable Under the Clean Water Act for Permit Exceedances Caused by Extreme and Unusual Acts of Nature May Have Substantial Consequences Affecting Every Permit Issued Under the Act.

The Court of Appeals acknowledged that the winter rains here were "unusual," App. at A-17, but held that the permit exceedances caused by those rains violated the law and could not be excused. The Court reasoned that unusual rains were likely to occur over the life of the plant. The Court interpreted the Clean Water Act to prohibit permit exceedances due to an unusual event where the unusual event is likely to occur over the life of a plant. Therefore, despite the District Court's finding of fact that the treatment plant here was adequate, the Court of Appeals concluded that the treatment plant was inadequate because it had suffered exceedances due to unusual storms that were likely to occur over the life of the plant.[14] App. at A-16-17. This understanding of the law lies at the core of the Court's decision.

The consequence of the Court of Appeals' interpretation is that permittees may be subject to enforcement actions unless they design their pollution control system to function normally despite extreme or unusual acts of nature, if those unusual events are likely to occur over the life of a plant. Permittees generally design

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[14] As a result of its analysis, the Court of Appeals reversed the District Court's factual finding that the design of the wastewater treatment plant was adequate and met the best practicable control technology standards, thus withdrawing the traditional deference accorded District Court findings of fact under the clearly erroneous standard. *E.g., Anderson v. City of Bessemer,* 470 U.S. 564 (1985).

their facilities to comply with permit terms during the normally anticipated course of operations and events. Now permittees would have to consider as well whether unusual events like damage-producing earthquakes, hurricanes, mudslides, or extraordinary storms are likely to occur during the life of the plant; if so, to avoid enforcement suits, permittees would have to design their facilities to insure compliance with permit terms even during those events. This interpretation of the Clean Water Act potentially affects every permit issued under the Act.[15]

As a practical matter, permittees may have to overdesign their facilities, generally spending far in excess of the identifiable benefits. This practical result frustrates the express and repeated Congressional intent to balance environmental, economic and social needs in the Act. For example, Senator Bentsen said:

> "[W]e must recognize that our zeal to clean up can create unnecessary chaos unless we spell out what we want and prevent the unreasonable application of controls which do not have any relation to the goals we seek."

2 Leg. Hist. at 1282.[16] Senator Randolph similarly emphasized:

> "[T]he committee does not want to impose impossible goals, nor does it intend to require expenditures so excessive that they would undermine our economy. Consequently, under the proposed legislation, controls must relate the economic

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[15] As of January 1984, there were approximataly 65,000 permits issued under the Clean Water Act. Hearings on Implementation of the Federal Clean Water Act Before the Subcommittee on Investigations and Oversight of the House Committee on Public Works and Transportaion, 98th Cong., 2d Sess. 4-5 (March 7, 1984) (Statement by Representative of General Accounting Office).

[16] The legislative history of the Clean Water Act has been compiled and reprinted in four volumes. Volumes 1 and 2 are entitled "A Legislative History of the Water Pollution Control Act Amendments of 1972," Committee Print 93-1, 93d Cong., 1st Sess. (1973). Volumes 3 and 4 contain the legislative history of the 1977 Clean Water Act Amendments. This petition refers only to the first two volumes and cites them as "Leg. Hist.," with the volume numbers preceding this term and the page number following it.

> and social benefits to be gained with the economic and social costs to be incurred."

2 Leg. Hist. at 1272. Senator Bayh stated too:

> "[T]he whole thrust of the bill is to force industry to do the best job it can do to clean up the Nation's water, and to keep making progress, without incurring such massive costs that economic chaos would result."

1 Leg. Hist. at 216.

The Court of Appeals erred because the Clean Water Act does not require permittees to design their facilities to comply with permit terms without regard to the unusual stresses of extreme natural events. The Clean Water Act expresses no such requirement. Union Oil's permit contains no such requirement and the rules on which the permit was based impose no such requirement. Instead, they generally contemplate permit compliance during the normal course of events.

Most of the permit terms here are based on rules promulgated by EPA. 40 C.F.R. Part 419. Those rules address operations in the normal course of events. EPA promulgated the rules to set limits on discharges from oil refineries based on the best practicable control technology available. To establish the limits, it evaluated proper operations in normally encountered circumstances and eliminated data resulting from unusual events. EPA deleted, for example, data showing the effects of hurricane Agnes on a coastal refinery in Texas because "they did not reflect the normal operation of a well run, carefully maintained operation." 40 Fed. Reg. 21946, col. 3 (May 20, 1975). The EPA limits were therefore based on the best practicable technology available in normal operations.[17]

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[17] The Court of Appeals suggests that the permit nevertheless did account for unusual events because it provided for adjustments in emission limits based on the amount of stormwater runoff. App. at A-7-8. The Court erred because stormwater runoff is part of the normal discharge at oil refineries and the stormwater adjustments assume that the system is functioning properly under 40 C.F.R. Part 419. These limits go to the ordinary operations of the refinery. They do not account

If EPA had attempted to establish limits based on best practicable technology not only for normal operations but also for unusual natural events, it would have had to set either less rigorous general standards or multiple sets of standards to accommodate the range and variety of foreseeable unusual events. To include both ordinary events and unusual events in one limitation, EPA would have had to set the limitation based on best practicable technology at the lowest common denominator, to enable plants to meet the limits even during unusual natural events. This result would have disserved the Congressional goal of cleaning up the Nation's waters. Alternatively, EPA could have established multiple sets of limitations based on ordinary events and various types of unusual events. This approach, too, would have disserved the statutory goals of promptly setting and applying emission limits to clean up the Nation's waters. The better course, and the one EPA adopted, was to set the most stringent limits appropriate for and applicable to normal operations.

Because the limits are intended to apply to operations in the normal course of events, exceedances of those limits are not violations when they result from unusual events outside the normal day-to-day course of operations and beyond the control of the permittee. The Clean Water Act excuses such exceedances, just as it excuses exceedances in the normal day-to-day operations when they are beyond the control of the permittee. In fact, in *Marathon Oil Company v. Environmental Protection Agency,* 564 F.2d 1253 (9th Cir. 1977), and *FMC Corp. v. Train,* 539 F.2d 973 (4th Cir. 1976), Courts required EPA to promulgate regulations requiring upset provisions in permits just to accommodate such exceedances in normal operations. The formal placement of the upset defense in each permit was deemed necessary because,

> "even a facility that employs [best practicable control technology] can be expected to be in violation of the standards at least a percentage of the time. It would be impossible and impracticable to set a standard that could be met 100 percent

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for the strains on the system caused by the rain and cold of extraordinary storms. In any event, as noted above, there was no additional stormwater allowance in the permit for phenols and most of the exceedances here related to phenols.

> of the time assuming [that technology] is employed in an exemplary fashion. This would require an accurate prediction of the innumerable types of upsets that could plague [the] systems."

Marathon Oil Company v. Environmental Protection Agency, 564 F.2d at 1272. EPA had argued that it was unnecessary to include the upset defense in each permit because:

> "If it appears to the EPA that a violation of the standard was not the fault of the permit holder, the EPA will informally exercise its discretion not to prosecute."

Id. The Courts rejected EPA's argument, and in response to those decisions, EPA promulgated regulations making the upset defense applicable to all federal permits. 40 C.F.R. § 122.41.

The upset defense should have applied as well in this case because by its terms, it excuses "exceptional" incidents of "unintentional and temporary noncompliance" due to "factors beyond the reasonable control of the permittee." 40 C.F.R. § 122.41(n)(1), App. at A-42. The District Court said the upset defense did apply to Union Oil's permit and the Court of Appeals said it did not because they interpreted differently the effect of a state law, which requires specific findings of water quality needs before the state may impose permit limits more stringent than the federal limits. Cal. Water Code § 13377; App. at A-33; App. at A-12-13. Regardless of whether the upset defense is formally a part of Union Oil's permit or not, the requirements of the Clean Water Act are the same: the Act is not intended to prohibit and penalize those permit exceedances caused by unusual events like extreme acts of nature which are beyond the control of the permittee.

II. The Decision Below Violates Due Process in Holding That a Permittee's Routine, Monthly Monitoring Reports Constitute Conclusive Evidence Against the Permittee.

The District Court held on the basis of the evidence introduced at trial that exceedances reported in seven of seventy-six alleged violations resulted from problems in wastewater sampling or analysis and were not permit violations. App. at A-31. The Court

of Appeals reversed. It concluded that as a matter of law, the monthly monitoring reports constituted conclusive evidence rather than prima facie evidence of a permit violation. App. at A-20-21. The Court held: "When a permittee's reports indicate that the permittee has exceeded permit limitations, the permittee may not impeach its own requirements by showing sampling error." App. at A-21.

The Court of Appeals viewed monitoring reports as creating an irrebuttable presumption of permit violation if they indicated an exceedance of permit terms, even if they also indicated, as five of the seven reports did here, Def. Ex. D, that the reported exceedance was based on invalid data resulting from analytical problems. The Court erred because neither the Clean Water Act nor the implementing regulations nor the permit here establish an irrebuttable presumption that permit exceedances indicated on routine monitoring reports constitute violations. The Clean Water Act authorizes EPA to require a permittee to submit monitoring reports to determine, among other things, whether the permittee is complying with permit terms, 33 U.S.C. § 1318; but it nowhere states that the monitoring reports constitute conclusive proof of violations in court and may not be challenged or corrected.[18] The implementing regulations require sworn certifications to prevent people from falsifying information in the monitoring reports and to penalize them if they do, 40 C.F.R. § 122.41(j) and (k); 40 C.F.R. § 122.22(d); but they nowhere state that monitoring reports constitute conclusive evidence in court of excessive discharges. Moreover, Union Oil's permit established monthly monitoring and other reporting requirements but did not state that an indication of an exceedance constitutes an irrebuttable presumption that Union Oil violated its permit. Def. Ex. Q.

Despite the lack of statutory or regulatory language imposing an irrebuttable presumption, the Court of Appeals interpreted the Act as requiring such an irrebuttable presumption because of the Congressional desire for speedy and efficient enforcement of the Act. App. at A-20-21. In reaching this conclusion, the Court

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[18] To the contrary, implementing regulations anticipate and provide for corrections to the monitoring reports. 40 C.F.R. § 122.41(l)(8).

relied upon the following language, taken from the legislative history:

> "'The bill . . . establishes and makes precise new requirements imposed on persons and subject to enforcement. One purpose of these new requirements is to avoid the necessity of lengthy fact finding, investigations and negotiations at the time of enforcement. Enforcement of violations of requirements under this Act should be based on relatively narrow fact situations requiring a minimum of discretionary decision making or delay.'"

App. at A-20-21, quoting S. Rep. No. 414, 92d Cong., 1st Sess. 64, reprinted at 2 Leg. Hist. 1482.

First, the language quoted above does not say that monitoring reports constitute conclusive proof of violation in court.

Second, the language above was directed to eliminating the cumbersome requirements of previous laws, not establishing irrebuttable presumptions for monitoring reports. As the sentence following the quoted language says, Congress sought to "delete the cumbersome conference and hearing procedures in the existing law;" those procedures had been associated with the previous control programs based solely on ambient water quality. Representative Vanik explained: "Everyone knows that the enforcement and penalty provisions provided in previous pollution control laws have been so cumbersome as to be unworkable. Under the 1948 abatement procedure, only one case has reached the courts in more than two decades." 1 Leg. Hist. at 529. *See also,* 2 Leg. Hist. at 1257 (Remarks of Senator Muskie); 2 Leg. Hist. at 1317 (Remarks of Senator Proxmire). The House Report reflected the same focus: "the Committee has provided fast, effective and straightforward enforcement procedures to replace enforcement conferences and 180-day notices in the Water Quality Act of 1965." 1 Leg. Hist. at 801. Thus, the quoted provision does not speak to creating irrebuttable presumptions for monitoring reports.

Third, if the Clean Water Act did establish such an irrebuttable presumption, it would run afoul of the Due Process Clauses in the Fifth and Fourteenth Amendments to the United States Constitu-

tion. Irrebuttable presumptions must rest on grounds "so compelling in character as to override the generally fundamental requirement of our system of law that questions of fact must be resolved according to the proof." *United States v. Provident Trust Company*, 291 U.S. 272, 281-82 (1934). The grounds at issue here are speedy and efficient enforcement; but, as this Court has said before, " 'the Constitution recognizes higher values than speed and efficiency.' " *Vlandis v. Kline*, 412 U.S. 441, 451 (1973), quoting *Stanley v. Illinois*, 405 U.S. 645, 656 (1972).

The Court of Appeals also presents other grounds for creating irrebuttable presumptions. It reasons that monitoring reports should create an irrebuttable presumption because allowing permittees to show error in their sampling methods or the laboratory analyses will reward "sloppy laboratory practices." App. at A-21. Again the Court errs in its reasoning. Invalid results occur in laboratories despite the best of practices. As an editor for *Standard Methods*, the text for wastewater analysis incorporated in EPA regulations, testified at trial: "[T]hese things are things that can happen in a laboratory without anyone making an error." 4 Tr. at 557-58, *see also*, 4 Tr. at 545 (Jenkins) ("Things happen in the best of laboratories"). The evidence here showed Union Oil accurately reported it had obtained results indicating exceedances in seven samples, and further reported, at the time of the initial report in most instances, that due to analytical problems the data were invalid.[19] Def. Ex. D. Union Oil reported these results fairly, proved them erroneous and should not be punished for violations that did not occur.

Finally, the Court of Appeals reasons that monitoring reports must constitute conclusive evidence of a violation; otherwise "citizen groups like the Sierra Club would be taking a considerable risk whenever they initiated a citizen enforcement action pursuant to 33 U.S.C. § 1365." App. at A-21. With due respect to

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[19] If Union Oil had acted improperly in preparing and submitting its monitoring reports, EPA and the State both could have proceeded against it directly. 33 U.S.C. § 1319, App. at A-36-37; Cal. Water Code § 13268(b), App. at A-40-41. Citizens do not share such authority. 33 U.S.C. § 1365.

the Court's concern, it is not "so compelling in character as to override the generally fundamental requirement of our system of law that questions of fact must be resolved according to the proof." *United States v. Provident Trust Company*, 291 U.S. 272, 281-82 (1934).

Because of the rise of citizen suits, it is particularly important to address this issue now. The large majority of the citizen suits are filed under the Clean Water Act because citizens may use the monitoring reports, which are both required by law and publicly available, to prove permit violations. *E.g.*, Fadil, "Citizen Suit Against Polluters: Picking Up the Pace," 9 Harv.Envtl.L.Rev. 23, 37 (1985). Both citizens and the potential targets of citizen suits are entitled to know whether the monthly monitoring reports constitute conclusive evidence in court of permit violations whenever they report exceedances, regardless of the validity or accuracy of the analytical results contained in the report.

CONCLUSION

For the reasons stated above, Union Oil respectfully urges the Court to grant this petition for certiorari.

Respectfully submitted,

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November, 1987.

Appendix A

SIERRA CLUB, a California non-profit corporation, Plaintiff-Appellant,

v.

UNION OIL COMPANY OF CALIFORNIA, a California corporation, et al., Defendants-Appellees.

No. 85-2868.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Dec. 10, 1986.

Decided April 3, 1987.

Before CHOY, GOODWIN and PREGERSON, Circuit Judges.

PREGERSON, Circuit Judge:

The Sierra Club brought a citizen enforcement action against Union Oil Company of California ("Union Oil") alleging that Union Oil violated the terms of its National Pollutant Discharge Elimination System ("NPDES") permit on seventy-six occasions. After a five-day trial, the district court found no violations of the permit. The court excused some of the reported exceedances of permit limitations by application of an upset defense (an excuse for permit violations when circumstances occur that are beyond the reasonable control of the permittee), some on the ground that reports of exceedances were mistakes caused by sampling error, and some by application of a purported de minimus exception to the Federal Water Pollution Control Act ("the Act"). Sierra Club appeals from these rulings and from the district court's denial of its motion for leave to file an amended complaint before trial. We reverse.

Sierra Club's original complaint alleged that Union Oil exceeded its permit limitations on seventy-six occasions during the period between 1979 and 1983. Union Oil's principal defense is

that approximately fifty of the exceedances were due to circumstances beyond Union Oil's reasonable control: unusually high levels of rainfall during the winters of 1981-1982 and 1982-1983. Union Oil argues that because these exceedances were caused by exceptional circumstances, Union Oil is entitled to assert an upset defense. Although Union Oil's permit contained no upset defense, Union Oil argues that *Marathon Oil Co. v. Environmental Protection Agency,* 564 F.2d 1253 (9th Cir.1977), and 40 C.F.R. § 122.41 (1986), necessitate the inclusion of an upset defense in the permit. Sierra Club counters by asserting that because Union Oil did not contest the terms of its permit when issued and reissued, Union Oil is barred by the doctrine of exhaustion of administrative remedies from seeking to amend the permit during this enforcement proceeding.

Union Oil's second major defense is that several of the permit exceedances were caused by sampling error, meaning that although reported as exceedances, they were in fact not exceedances. Sierra Club and the Environmental Protection Agency ("EPA") as amicus curiae argue that because accurate self-monitoring is critical to the effectiveness of the Federal Water Pollution Control Act, sampling errors should not be recognized as valid excuses for asserted exceedances of NPDES permits.

This case raises significant questions about the operation of the Federal Water Pollution Control Act. In particular, we must consider the issue of the states' power under the Act to impose more stringent water regulations than those imposed by the Environmental Protection Agency. We must also consider the level to which the viability of a self-monitoring system such as the NPDES requires courts to hold permittees accountable for all errors in reporting.

BACKGROUND

I. *Statutory Scheme*

The objective of the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (1986), is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). As amended in 1972, the Act

declares that "it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985." 33 U.S.C. § 1251(a)(1). In furtherance of these goals, the Act prohibits the discharge of all pollutants except as authorized by the Environmental Protection Agency. 33 U.S.C. § 1311(a).

The Act requires that the EPA promulgate "effluent limitation" standards[1] for numerous categories of industrial polluters. These standards are principally technology-based, limiting discharges to levels achievable by use of "the best practicable control technology currently available." 33 U.S.C. § 1311(b)(1)(A). Water quality standards are used as a supplementary basis for effluent limitations, so that numerous dischargers, despite their individual compliance with technology-based limitations, can be regulated to prevent water quality from falling below acceptable levels. *Environmental Protection Agency v. California ex rel. State Water Resources Control Board*, 426 U.S. 200, 205 n. 12, 96 S.Ct. 2022, 2025 n. 12, 48 L.Ed.2d 578 (1976).

Under the National Pollutant Discharge Elimination System, 33 U.S.C. § 1342, the EPA issues permits to individual dischargers. Under the permit, the generally applicable effluent limitations and other standards become the obligation of the individual discharger. *Environmental Protection Agency v. California*, 426 U.S. at 205, 96 S.Ct. at 2025. The Act requires that each discharger holding a NPDES permit monitor and report on its compliance with its permit. Each discharger must install, use, and maintain monitoring equipment and must sample its effluents. 33 U.S.C. § 1318(a)(4)(A). The discharger must report the results of its self-monitoring to the EPA and the state agency that issues the permit. These self-monitoring reports are to be submitted at intervals specified in the permit. 40 C.F.R. § 122.41(1)(4).

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[1] An "effluent limitation" is "any restriction established by a State or the [EPA] Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources . . . including schedules of compliance." 33 U.S.C. § 1362(11). A "point source" is "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

In accordance with the Act's policy "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution," 33 U.S.C. § 1251(b), states that follow the procedures outlined in the Act are authorized to issue NPDES permits to discharging entities within the state. 33 U.S.C. §§ 1251(b), 1342(b). All states must comply with the Act and with the EPA's regulations, but a state may adopt its own effluent limitations and standards so long as they are not less stringent than the EPA's correlative limitations and standards. 33 U.S.C. § 1370. Before a state issues any NPDES permit, it must transmit a copy of the proposed permit to the federal EPA Administrator. The EPA Administrator may object within ninety days to the issuance of the proposed permit and subject it to a review process. 33 U.S.C. § 1342(d)(2).

Actions to enforce the permit terms against the permittee may be brought by the EPA, 33 U.S.C. § 1319, or by concerned citizens, 33 U.S.C. § 1365. The Act provides for criminal and civil penalties to be imposed, with civil fines ranging as high as $10,000 per day for each violation. 33 U.S.C. § 1319(d).

The original regulations promulgated under the Act did not provide for any exceptions to NPDES permit terms when permit exceedances occurred because of conditions outside of the reasonable control of the discharger. In 1977, however, this court determined that, under some circumstances, the Act requires that an upset defense be made available to permittees. In *Marathon Oil*, 564 F.2d at 1272-73, the EPA issued a permit to Marathon Oil for its offshore oil platforms and onshore facilities, but, in accordance with normal policy, did not include any upset provision in the permit. Marathon requested review by the EPA Regional Administrator and then by the EPA Administrator, challenging the terms of the permit and complaining, inter alia, of the absence of an upset provision. When the EPA Administrators affirmed the permit containing no upset provision, Marathon appealed to this court, as allowed under 33 U.S.C. § 1369(b). We remanded the case with instructions to the EPA to insert an upset

provision in Marathon's permit.[2] *Marathon Oil*, 564 F.2d at 1272-73.

After *Marathon Oil* was decided, the EPA amended 40 C.F.R. § 122.41 to include a formal upset provision. The section provides for incorporating the upset defense into all NPDES permits, either explicitly or by reference to the relevant regulations. It defines "upset" as "an exceptional incident in which there is unintentional and temporary noncompliance with technology based permit effluent limitations because of factors beyond the reasonable control of the permittee." 40 C.F.R. § 122.41(n). The scope of the upset defense under the section does not include noncompliance caused by "operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation." *Id.* The regulation also imposes stringent procedural requirements for asserting the upset defense and places the burden of proof upon the party claiming the defense. *Id.*

The states' role relative to the conditions (one of which is the upset defense) described in 40 C.F.R. § 122.41 is set out in 40 C.F.R. § 123.25. That section provides that states may omit or modify any of section 122.41's conditions to impose more stringent requirements. 40 C.F.R. § 123.25(a)(12). The section concludes by stating:

> NOTE: States need not implement provisions identical to the above listed provisions. Implemented provisions must,

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[2] In support of this holding we stated:

> The Federal Water Pollution Control Act requires point sources of pollution to utilize the "best practicable control technology currently available" prior to 1983. The EPA cannot impose a higher standard without violating the Control Act. And yet the permits as currently written do exactly that.
>
> . . . .
>
> . . . The EPA is free in writing the formal upset provision to place the burden on the permit holder of producing relevant data and proving that the upset could not have been prevented.

Marathon Oil, 564 F.2d at 1272-73.

> however, establish requirements at least as stringent as the corresponding listed provisions.
>
> . . . .
>
> For example, a State may impose more stringent requirements in an NPDES program by *omitting the upset provision* of § 122.41 or by requiring more prompt notice of an upset.

40 C.F.R. § 123.25(a) (emphasis added).

II. *Facts*

Union Oil operates an oil refinery that discharges treated wastewater into the San Pablo Bay (at the north end of San Francisco Bay) from two onshore monitoring stations, referred to as E-001 and E-004. Wastewater discharged through E-001 consists solely of non-contact cooling water, which is saltwater taken from the Bay used primarily to cool refinery equipment containing heated oil without coming into contact with the oil. Wastewater discharged through E-004 contains non-contact cooling water, process wastewater, and stormwater runoff. The process wastewater consists of water contaminated with refining wastes, primarily oil, and a small amount of wastewater from sinks and toilets at the refinery.

For treating the process wastewater and stormwater runoff, the refinery uses a sewer system that routes the water to the wastewater treatment plant (Unit 100). In 1977, Union Oil installed biological treatment equipment, which divides the combined process wastewater-stromwater stream into two separate waste streams and provides different treatment for each stream. The first waste stream, known as the "segregated" waste stream, contains high concentrations of pollutants and is routed to the wastewater treatment plant via a separate pipe. The segregated stream receives special pretreatment, one or two types of biological treatment in Unit 100, and finally, treatment by the activated sludge-clarifier system, known as the "bioplant." The second waste stream, known as the "unsegregated" waste stream, contains all of the remaining process wastewater and stormwater. The unsegregated waste stream is routed to Unit 100 through a combined sewer system. At Unit 100 this stream is first treated in

a system designed to remove both oils and solids from the wastewater. The system has storm basins to store excess flows from the combined sewer system during periods of heavy rainfall. After the unsegregated waste[illegible]m undergoes this preliminary treatment, it, along with the seg[illegible]gated waste stream, receives biological treatment in the bio[illegible]ant.

The biological treatment system has a design capacity of 2500 gallons per minute and is designed to provide treatment at all times to the segregated stream and, under normal weather conditions, to most of the unsegregated waste stream. When the quantity of water to be treated exceeds this level of 2500 gallons per minute, the system automatically treats all of the segregated waste stream and as much of the unsegregated stream as possible. The rest of the unsegregated stream is routed around the bioplant and is later combined with the water that has been treated in the bioplant. As a result, during heavy storms, the water released from the plant may contain pollutants in quantities greater than those allowed under the permit.

Union Oil possesses an NPDES permit issued by the California Regional Water Quality Control Board ("California Water Board"). The initial permit, issued in November 1974, did not contain an upset provision. Union Oil petitioned the State Water Resources Control Board for review of the permit, specifically complaining of the absence of an upset provision. The State Board upheld the permit, stating that providing an upset defense is discretionary with the Regional Board. Union Oil did not appeal from the State Board's ruling. The permit was amended in 1977 and 1979, and a new permit was issued in 1980. The California Water Board never inserted an upset provision in Union Oil's permit, either explicitly or by reference to the relevant C.F.R. provisions. Union Oil never again requested review of the permit.

Union Oil's permit for the period in question contains provisions to bring it into compliance with the Federal Water Pollution Control Act and with more stringent state pollution standards. Some of these restrictions are based on the best practicable technology currently achievable, and some are based on standards of water quality. The permit contains a specific provision for an

upward adjustment of certain effluent limitations for periods of heavy rainfall, by which additional contaminants may be discharged in proportion to the stormwater involved.

On June 4, 1984, Sierra Club filed this citizen suit pursuant to 33 U.S.C. § 1365, seeking injunctive relief and the imposition of civil penalties because Union Oil violated its NPDES permit. Based upon Sierra Club's review of wastewater test results contained in Union Oil's Discharge Monitoring Reports (DMRs) and Non-Compliance Reports (NCRs), Sierra Club alleged seventy-six violations of the permit limitations during the five-year period from 1979 to 1983. Union Oil filed a motion for summary judgment on the ground that many of the permit violations occurred as a result of heavy rainfall during the winters of 1981-1982 and 1982-1983, thus qualifying as upsets under 40 C.F.R. § 122.41(n). The trial court denied the motion.

Trial was set for September 9, 1985. Pursuant to Sierra Club's request for a continuance, the court continued the trial to October 29, 1985. On August 27, 1985, Sierra Club filed a motion for leave to file an amended complaint. The amended complaint included allegations of violations occurring before March 30, 1979. Sierra Club argued that these claims were not barred by the five-year statute of limitations because Sierra Club had been unaware of the facts underlying the claims until December 14, 1979, and because Union Oil had committed fraud in concealing the violations.[3] Sierra Club also filed a motion for partial summary judgment on the ground that Union Oil could not, as a matter of law, file reports reflecting that it had exceeded its permit limitations and then later challenge its own reports with evidence of sampling errors. The court set hearing of the motions for October 11, 1985. After this date was set, Sierra Club filed a motion for reconsideration of a magistrate's order denying discovery as to events occurring before 1979, which is beyond the federal statute of limitations period. On October 17, 1985, the

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[3] Sierra Club argued during the hearing on its motion to amend that no statute of limitations applied to Federal Water Pollution Control Act causes of action. The district court rejected this notion, and Sierra Club has not renewed the argument on appeal.

court denied Sierra Club's motion for partial summary judgment. It also denied Sierra Club's motions for leave to file its amended complaint and for reconsideration of the magistrate's order; the court denied the motions on the grounds of delay, prejudice to defendants, and the fact that some of the additional allegations were based on documents available to plaintiff when the original complaint was filed.

After five days of trial, the district court found in favor of Union Oil on all points. The court found that thirteen of the exceedances were not even actual exceedances "because the applicable permit limitation either was not exceeded, or because the result was caused by error in wastewater sampling or analysis." Findings of Fact and Conclusions of Law ("Memorandum") at 8. The court found that fifty of the exceedances were excusable under an upset defense. *Id.* at 8, 10. Finally, it found that "a few exceedances (minor in magnitude) [presumably the thirteen remaining exceedances] were caused by very unusual human errors that are excusable in light of time span and number of acceptable readings." *Id.* at 9-10. Sierra Club brought a timely appeal.

ANALYSIS

I. *Upset Defense*

We hold that the district court erred in allowing Union Oil to raise the upset defense in this enforcement proceeding. Moreover, the district court misapplied the upset defense as codified in 40 C.F.R. § 122.41(n).

A. *Union Oil's Qualifications to Assert the Defense*

1. Federal Law

The issue whether Union Oil was entitled under the Act to raise the upset defense involves interpretation of federal law. The district court's findings on this issue are therefore reviewable de novo. *See, e.g., Trustees of Amalgamated Insurance Fund v. Geltman Industries,* 784 F.2d 926, 929 (9th Cir.), *cert. denied,* ___ U.S. ___, 107 S.Ct. 90, 93 L.Ed.2d 42 (1986).

The district court found that Union Oil was entitled to assert the upset defense under *Marathon Oil*, 564 F.2d at 1253, 1272-73, and under 40 C.F.R. § 122.41. We disagree.

This is an enforcement action in which Sierra Club alleged that Union Oil failed to comply with the terms of a permit issued by the California Water Board. Union Oil was essentially asking the district court to modify its permit to include an upset provision. This the district court was not entitled to do. To obtain modification of its permit, Union Oil should have acted through the proper administrative channels. Because Union Oil failed to exhaust its administrative remedies, it is bound by the terms of the permit issued by the California Water Board.

[1] A party must exhaust its adminstrative remedies before it can obtain judicial review of an agency decision. *McKart v. United States*, 395 U.S. 185, 193, 89 S.Ct. 1657, 1662, 23 L.Ed.2d 194 (1969). The purpose of the exhaustion rule is "to allow an administrative agency to perform functions within its special competence—to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies." *Parisi v. Davidson*, 405 U.S. 34, 37, 92 S.Ct. 815, 817, 31 L.Ed.2d 17 (1972). At the time the permit was issued and reissued, Union Oil had several administrative routes that it could have taken to protest the permit's terms. The NPDES program authorizes permittees to seek modifications of their permits in response to current judicial decisions and new EPA regulations. 40 C.F.R. § 122.62. In addition, when a state permit issuer submits a proposed permit to the EPA Administrator for review, the Administrator is authorized to object to the permit's terms. 33 U.S.C. § 1342(d). Review of the Administrator's actions may be had in the appropriate circuit court of appeals. 33 U.S.C. § 1369(b)(1). The Act further provides that "[a]ction of the Adminstrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement."[4] 33 U.S.C. § 1369(b)(2).

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[4] Marathon Oil Company in *Marathon Oil*, 564 F.2d at 1253, followed the administrative procedure as mandated. In that case, this court

[2] Union Oil failed to seek any type of administrative review of its permit's terms since its appeal of the original permit in 1974. If Union Oil desired modification of its permit in the wake of *Marathon Oil* or the adoption of 40 C.F.R. § 122.41, it should have petitioned the California Water Board for review of the permit. When the EPA Administrator failed to object to the permit's terms, Union Oil should have appealed from that decision. Union Oil failed to follow the administrative steps that would have allowed the issuing agency to address Union Oil's claims. Union Oil only initiated criticism of its permit in an enforcement action before the district court. Therefore, Union Oil failed to exhaust its administrative remedies and was precluded from raising the upset defense in the district court.

Union Oil argues that the doctrine of exhaustion of administrative remedies does not apply here because the upset defense was available to Union Oil under *Marathon Oil* and 40 C.F.R. § 122.41. The upset defense is not, however, an implicit element of Union Oil's permit under *Marathon Oil* or 40 C.F.R. § 122.41. *Marathon Oil* stated that the absence of an upset defense from a *federally* issued permit violated the Federal Water Pollution Control Act. *Marathon Oil*, 564 F.2d at 1272-73. Therefore, when the EPA itself issues a permit, it must, under *Marathon Oil*, include an upset defense.[5] In this case, however, a state agency, not the EPA, issued the permit. The Act explicitly allows states to substitute federal effluent limitations and standards with more stringent state limitations and standards. 33 U.S.C. § 1370. The state's denial of the upset defense is an example of a state imposing standards more stringent than the correlative federal standards. Therefore, the absence of the upset defense in Union Oil's permit does not violate the Federal Water Pollution Control

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reviewed the Adminstrator's decision to exclude the upset defense from a permit. *Id.* at 1259.

[5] We make no determination as to whether *Marathon Oil* applies only to technology-based permit exceedances or to both water quality-based and technology-based exceedances. In addition, we do not intend to imply that an enforcement action is ever the appropriate forum for challenging the terms of an NPDES permit.

Act, and *Marathon Oil* does not mandate its presence in the permit.[6]

The EPA's regulations promulgated under the Act likewise do not provide Union Oil with an automatic upset defense. 40 C.F.R. § 122.41 states that the upset defense must be incorporated into the permit either expressly or by reference to the relevant C.F.R. sections. Because Union Oil's permit contains neither an express incorporation nor an incorporation by reference, the defense is not a part of the permit. In addition, while the EPA under this section must include the upset defense in all permits it issues, the regulations explicitly provide that states may omit upset defenses from permits. 40 C.F.R. § 123.25(a).

2. California law

[3] Union Oil contends that even if federal law does not mandate the inclusion of an upset defense, California law does. Because this question involves the interpretation of state and federal law, we review the district court's determinations de novo. *In re McLinn*, 739 F.2d 1395, 1397 (9th Cir. 1984) (en banc) (state law); *Trustees of Amalgamated Insurance Fund*, 784 F.2d at 929 (federal law).

Union Oil argues that the California Water Board was not permitted under California law to omit the upset defense from a permit unless it made proper findings of necessity for doing so. Again, Union Oil is improperly making this argument during an enforcement proceeding. Union Oil should have pursued its administrative remedies before the state agency and the EPA. Union Oil's failure to exhaust its administrative remedies bars it

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[6] *Marathon Oil's* principal point on this subject is that once a discharger employs the best practicable technology, it is unreasonable to require 100% compliance with the effluent limitations described in the permit. However, the Act entitles the states to select the standards that dischargers must achieve, 33 U.S.C. § 1370. The language of the Act indicates that striving for the utter abolition of pollution is an acceptable approach for states to take. The Act states as one of its objectives the elimination of discharge of pollutants by 1985. 33 U.S.C. § 1251(a)(1). It also recognizes the primary rights and responsibilities of states "to prevent, reduce, and eliminate pollution." 33 U.S.C. §1251(b).

from criticizing the permit's terms in this action. Union Oil argues, however, that under California law, the upset defense is an automatic element of Union Oil's permit.

California Water Code § 13377 (West Supp.1987) provides:

> [T]he state board or the regional boards shall, as required or authorized by the Federal Water Pollution Control Act, as amended, issue waste discharge requirements . . . which apply and ensure compliance with all applicable provisions of the act ,and acts amendatory thereof or supplementary, thereto, together with any more stringent effluent standards or limitations necessary to implement water quality control plans, or for the protection of beneficial uses, or to prevent nuisance.

Union Oil argues: (1) that the California Water Board violated this law by issuing a permit without an upset defense when it failed to make findings of the necessity of this more stringent standard, (2) that when a state fails to pass a more stringent standard, the federal standard governs, and (3) that the governing federal standard is 40 C.F.R. § 122.41(n), which provides an upset defense. Thus, Union asserts that the federal upset defense regulation applies to Union Oil's permit.

Union Oil's argument is incorrect. California Water Code § 13377 governs the state agency's setting of standards,[7] but the fact that the agency may not have complied with the statute does not implicitly insert an upset provision into Union Oil's permit. The state's method of adopting a more stringent standard should

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[7] The statute as written does not, as Union Oil argues, necessarily require "findings" by the state showing its more stringent standards to be necessary.

See Appellee's Brief at 41. In the case cited by Union Oil, *Southern California Edison Co. v. State Water Resources Control Board*, 116 Cal.App.3d 751, 172 Cal.Rptr. 306 (1981), the California Water Board set limitations that were more restrictive than those contained in California's own Ocean Plan. *Id.* at 758-59, 172 Cal.Rptr. at 310. *Southern California Edison* does not address the situation in which a California permit applies standards more stringent than the federal Act but in keeping with California law, and thus does not govern this case.

be subject to scrutiny only at the permit issuance stage. Moreover, even if the federal upset regulation did apply, it would not require that an upset defense be inserted into Union Oil's permit because 40 C.F.R. § 122.41 requires that the defense be inserted either explicitly or by reference to the relevant regulations, neither of which occurred here.

We hold that Union Oil was not entitled to use the upset defense to excuse any of the exceedances of its NPDES permit limitations.

B. ***District Court's Application of the Upset Defense***

The district court misapplied the upset defense to Union Oil's alleged permit violations. The upset defense, as codified at 40 C.F.R. § 122.41(n), protects a permittee from liability only when the permittee proves that highly unusual circumstances made preventing pollution difficult. The regulation imposes numerous stringent requirements, both substantive and procedural, that must be satisfied before a court may allow use of the upset defense.

The district court found in the broadest terms that all of Union Oil's permit violations were excusable on upset defense and other grounds. The court applied the upset defense, as codified at 40 C.F.R. § 122.41(n), only in adopting its definition of "upset" as "an exceptional incident in which there is unintentional and temporary noncompliance with technology based permit effluent limitations because of factors beyond the reasonable control of the permittee." 40 C.F.R. § 122.41(n). The district court ignored both substantive and procedural requirements for application of the upset defense. The court's interpretations of the regulation are conclusions of law that are reviewable de novo. *Trustees of Amalgamated Insurance Fund*, 784 F.2d at 929. The district court's finding of fact are reviewable on a clearly erroneous basis. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 541, 92 L.Ed. 746 (1948).

1. ***Substantive Deficiencies***

a. Water Quality-Based Exceedances

[4] The district court erred in applying the upset defense to exceedances of water quality-based permit limitations. The EPA regulation permits use of the upset defense only with respect to *technology-based* permit exceedances. 40 C.F.R. § 122.41(n)(1).

The federal Administrator and state boards may, under the Act, impose water quality-based standards or technology-based standards.[8] The federal government establishes technology-based effluent standards based on polluters' technological and economic ability to control effluent levels. Technology-based limitations require application of the best practicable control technology currently available, as defined by the Administrator. *See* 33 U.S.C. § 1311(b)(1)(A). These limitations require that each permittee within a given industrial subcategory restrict its effluent levels to certain numerical amounts.

States establish water quality standards that specify the uses to be made of a body of water and the maximum levels of pollutants allowable in view of those uses. Water quality standards are designed to ensure the survival of wildlife in navigable waters and to protect recreational activities in and on the water. 33 U.S.C. § 1312(a). In contrast with technology-based standards, which are based on the feasibility of limiting effluent levels, water quality-based limitations relate to the environmental effects of different effluent levels.

While the EPA considered applying the upset defense to water quality-based exceedances, *see* 47 Fed.Reg. 52,079 (1982), it later rejected this application as impractical:

> [I]t is apparent that it is not practical to extend the upset defense to violations of water quality-based limitations. Failures of pollution control equipment can occur on water

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[8] For an enlightening discussion of technology-based and water quality-based permit limitations, see Gaba, *Federal Supervision of State Water Quality Standards Under the Clean Water Act*, 36 Vand.L.Rev. 1167 (1983).

> quality limited stream segments. However, water quality standards are established to protect uses of the water, and are legally required to be met at all times. . . . Any defense for upsets must ensure that water quality standards are achieved at all times throughout the upset. . . . [and] would require a showing that water quality standards continued to be achieved in all stream segments, and for all pollutants, potentially affected by the discharge.
>
> . . . .
>
> Since it would be almost impossible for a permittee to establish the upset defense, the proposed extension [to water quality-based limitations] would be illusory. . . .

49 Fed.Reg. 38,038 (1984).

The record indicates that at least twenty-two of the permit violations were water quality-based, involving visible oil on San Pablo Bay, settleable solids, and coliform violations. The district court erred in holding that the upset defense as provided in 40 C.F.R. § 122.41 excused these violations of the permit's water quality-based limitations.

b. ***Operator Error***

[5] The district court stated that "a few exceedances (minor in magnitude), during the five-year period at issue, were caused by very unusual human errors that are excusable in light of time span and number of acceptable readings." Memorandum at 9-10. The court does not make clear whether it makes this analysis under the upset defense provision. If the analysis was based upon the upset defense, it was clear error. The upset provision clearly states that noncompliance caused by operational error is not an upset. 40 C.F.R. § 122.41(n). We conclude below that these exceedances were not excusable on any other grounds.

c. ***Inadequate Facilities***

The upset provision does not apply to noncompliance caused by improperly designed or inadequate treatment facilities. 40 C.F.R. § 122.41(n)(1). The record indicates that Union Oil's facilities were not adequate to handle heavy rainfall. Union Oil's supervisor

of environmental control engineering stated in his declaration in support of Union Oil's motion for summary judgment that the capacity of Union Oil's storm basins is "generally sufficient to contain the excess wastewater occurring during any storm of a magnitude which is expected to occur on the average of once every ten years." Declaration of Donald W. DeBuse in Support of Union Oil Company of California Motion For Summary Judgment at 8. If the plant was only designed to handle rains of a magnitude occurring every ten years, the statistical chance is very high that unusual rains will cause exceedances of permit limitations over the life of the plant.

The inadequacy of Union Oil's facilities in this case is underlined by the fact that Union Oil's permit also adjusts upwardly the limitations for periods of heavy rainfall. Union Oil's pollution during the winters of 1981 and 1982 exceeded even the limitations reflecting this upward adjustment. By providing this stormwater runoff adjustment, which varies according to amounts of rainfall, the California Water Board was indicating what levels of pollution should occur in a properly designed and adequate plant when heavy rains take place. A plant like Union Oil's that is incapable of adhering even to these adjusted limitations is inadequate. On the basis of inadequate equipment alone, all of the violations attributed by Union Oil to heavy rain should not have been excused on the upset defense ground.

2. *Procedural Deficiencies*

[6] The district court made no findings as to whether Union Oil complied with the procedural requirements for showing an upset. A permittee who wishes to raise the defense of upset must show:

(1) that an upset occurred and that the permittee can show the cause;

(2) that the facility was properly run at the time of the upset;

(3) that the permittee provided the proper notice of the upset;

(4) that the permittee conformed with remedial requirements.

40 C.F.R. § 122.41(n)(3). In addition, the burden of proof is on the permittee to show compliance with these requirements. 40 C.F.R. § 122.41(n)(4).

The district court applied none of these procedural rules. It did not place the burden of proof on Union Oil for use of the defense. While the record contains evidence that Union Oil failed to identify causes for several violations and provided insufficient notice in some cases, the district court held that the upset defense excused Union Oil in all cases. Failure to require that the permittee satisfy all of the procedural requirements specified in 40 C.F.R. § 122.41(n)(3) is improper.

The district court's failure properly to apply the upset defense regulation in itself justifies reversal of its finding of no liability as to the allegedly rainfall-related exceedances.

II. *De Minimus Theory*

[7] The district court's application of a purported de minimus exception to the Clean Water Act raises an issue of statutory interpretation and is reviewable de novo. *See, e.g., Trustees of Amalgamated Insurance Fund*, 784 F.2d at 929.

As noted above, the district court excused "a few" of the exceedances on the ground that they "were caused by very unusual human errors that are excusable in light of time span and number of acceptable readings." It is unclear whether the court intended to excuse these violations under the upset defense or under a de minimus theory. In either event, the district court erred. The Clean Water Act and the regulations promulgated under it make no provision for "rare" violations. Our legal system would be quite different if one's behavior were evaluated using the aggregative method the district court applied.

III. *Sampling Error Defense*

The district court's findings that reported violations were excusable as based on sampling errors is a question of statutory interpretation, reviewable de novo. *See, e.g., Trustees of Amalga-*

mated Insurance Fund, 784 F.2d at 929. The district court's finding that some of the alleged violations were not actual violations is a finding of fact, reviewable under the clearly erroneous standard. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 541, 92 L.Ed. 746 (1948).

The district court's opinion states:

> Of those alleged . . . violations, Union Oil presented evidence that thirteen were not even actual exceedances of permit limitations, because the applicable permit limitation either was not exceeded, or because the result was caused by error in wastewater sampling or analysis.

Memorandum at 8.

The court made no explicit finding on Union Oil's contention that thirteen of the alleged exceedances either were not exceedances or were caused by sampling error. We must surmise from the court's excusing Union Oil on all of the alleged violations that the court found that in the cases of these thirteen alleged violations either Union Oil had not violated the permit's terms or the exceedances were excusable due to sampling error.

Of the thirteen alleged violations in question, Union Oil presented some evidence that six were not in fact exceedances of the limitations set out in the permit. Two of the thirteen alleged violations are allegations of biochemical oxygen demand and oil and grease violations in February 1983 and December 1981, respectively. Because the district court made no finding as to whether these two alleged permit violations were in fact permit violations, we remand for the purpose of allowing the district court to make a finding of fact on this point.

[8] The district court also failed to make findings of fact as to Union Oil's denial that in four instances it violated the permit's prohibition against creating conditions of visible oil in the receiving waters. It is unnecessary to remand this question because the record shows as a matter of law that Union Oil did violate the visible oil limitation. Union Oil argued at trial that while visible oil had been observed on the water near one of Union Oil's monitoring stations, there was no evidence of visible oil on San

Pablo Bay. But Union Oil's permit limitations applied to "the waters of the state," not merely to San Pablo Bay. Thus, the four alleged visible oil violations were in fact chargeable to Union Oil.

[9] Union Oil argued that seven of the alleged violations were excusable because, while the Discharge Monitoring Reports ostensibly indicated that Union Oil had exceeded limitations contained in the permit, these reports were invalid due to sampling error. We hold that the district court should not have excused these exceedances on the basis of sampling error.

The NPDES program fundamentally relies on self-monitoring. The Code of Federal Regulations contains several provisions that are obviously designed to ensure utmost accuracy in the reports submitted by permittees. For instance, 40 C.F.R. § 122.22 requires that a person signing a self-monitoring report shall make the following certification:

> I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

The regulations at 40 C.F.R. §§ 122.41(j) and (k) establish numerous requirements for self-monitoring and reporting. These sections provide for heavy criminal penalties for anyone who knowingly falsifies reports or knowingly makes any false statement.

These and other EPA regulations demonstrate the agency's concern that reports be accurate. The legislative history surrounding the 1972 amendments to the Act supports the conclusion that accurate reports are critical to effective operation of the Act:

> [T]he bill . . . establishes and makes precise new requirements imposed on persons and subject to enforcement. One purpose of these new requirements is to avoid the necessity of lengthy fact finding, investigations, and negotiations at the time of enforcement. Enforcement of violations of requirements under this Act should be based on relatively narrow fact situations requiring a minimum of discretionary decision making or delay.

S. Rep. No. 414, 92nd Cong., 1st Sess. 64, *reprinted in* 1972 U.S.Code Cong. & Ad. News 3668, 3730.

Were we to accept Union Oil's argument regarding the use of sampling errors to excuse reported permit exceedances, we would be sanctioning countless additional hours of NPDES litigation and creating new, complicated factual questions for district courts to resolve. As indicated by the legislative history, Congress hoped to limit such situations. In addition, if each self-monitoring report is to be considered only prima facie rather than conclusive evidence of an exceedance of a permit limitation, citizen groups like the Sierra Club would be taking a considerable risk whenever they initiated a citizen enforcement action pursuant to 33 U.S.C. § 1365. While a permittee's publicly filed reports might clearly indicate that illegal pollution was taking place, the permittee might have additional information unavailable to citizen groups indicating that sampling error rendered the reports meaningless. Finally and most importantly, allowing permittees to excuse their reported exceedances by showing sampling error would create the perverse result of rewarding permittees for sloppy laboratory practices. Such an approach would surely undermine the efficacy of the self-monitoring program.

We conclude that when a permittee's reports indicate that the permittee has exceeded permit limitations, the permittee may not impeach its own reports by showing sampling error.

IV. *Amendment of Complaint*

This court applies an abuse of discretion standard of review to district court decisions to deny leave to amend a complaint after a pleading responsive to the original complaint has been served.

Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962); *Klamath-Lake Pharmaceutical Association v. Klamath Medical Service Bureau,* 701 F.2d 1276, 1292 (9th Cir.), *cert. denied,* 464 U.S. 822, 104 S.Ct. 88, 78 L.Ed.2d 96 (1983).

Sierra Club's proposed amended compliant alleged additional permit violations falling into three catagories: (1) reported violations occurring after March 30, 1979, (2) reported violations occurring before March 30, 1979, and (3) unreported violations. The district court denied Sierra Club's motion for leave to file the amended complaint. Sierra Club now seeks reversal of the district court's denial of leave to amend, except with respect to those violations in category (2), reported violations occurring before March 30, 1979.

Federal Rule of Civil Procedure 15(a) provides that leave to amend "shall be freely given when justice so requires." This court in *Howey v. United States,* 481 F.2d 1187, 1190 (1973) stated:

> The purpose of pleading is "to facilitate a proper decision on the merits," *Conley v. Gibson,* 355 U.S. 41, 48 [78 S.Ct. 99, 103, 2 L.Ed.2d 80], . . . (1957), and not to erect formal and burdensome impediments in the litigation process. Unless undue prejudice to the opposing party will result, a trial judge should ordinarily permit a party to amend its complaint.

[10] The district court held that Sierra Club was barred by the five-year statute of limitations, 28 U.S.C. § 2462, from prosecuting claims based on violations occurring before June 30, 1979, and that therefore amendments describing those violations, even the unreported ones, would be futile. *See* Order Denying Plaintiff's Motions For Summary Judgment, For Leave to File an Amended Complaint, and for Reconsideration of Magistrate's Order Denying Further Discovery at 8. As to the unreported violations occurring after March 30, 1979, there is not statute of limitations problem. As to the unreported violations occurring before March 30, 1979, Sierra Club contends that (a) as claimant in this case, it did not learn of these violations until after the original complaint was filed, and (b) Union Oil committed fraud in concealing the violations. Because Sierra Club has raised pertinent questions of fact for the district court on whether the

statute of limitations has been tolled (issues that the district court did not address in its memorandum supporting denial of the amendments), the district court is incorrect in peremptorily deeming amendments pertaining to the unreported pre-March 1979 violations to be futile.

In addition to citing the statute of limitations bar as justification for denying leave to amend, the district court denied amendment of the entire complaint because Sierra Club had access to information concerning some of the newly alleged violations when it filed the original complaint and because of delay and prejudice.

[11] Because Sierra Club knew or should have known when it filed the original complaint of five of the new violations alleged in the amended complaint, it was properly denied amendment with respect to those violations. We have held that where the party seeking amendment knows or should know of the facts underlying the amendment when the original complaint is filed, the motion to amend may be denied. *Jordan v. County of Los Angeles*, 669 F.2d 1311, 1324 (9th Cir.), *vacated on other grounds*, 459 U.S. 810, 103 S.Ct. 35, 74 L.Ed.2d 48 (1982). As to the rest of the complaint here, however, the district court had no basis under the law of this circuit to deny the amendment.

[12] Mere delay in proffering an amendment does not justify denying leave to amend. *Howey*, 481 F.2d at 1190-91. This court has also held that where a defendant is on notice of the facts contained in an amendment to a complaint, there is no serious prejudice to defendant in allowing the amendment. *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1053 n. 68 (9th Cir. 1981), *cert. denied*, 459 U.S. 825, 103 S.Ct. 57, 74 L.Ed.2d 61 (1982); *see also Buder v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 644 F.2d 690, 694 (8th Cir. 1981). Here, where all of the amendments were based upon facts contained in Union Oil's own records, Union Oil had notice of the facts. Thus, there is no prejudice to Union Oil.

Howey also provides: "Where there is a lack of prejudice to the opposing party and the amended complaint is obviously not frivolous, or made as a dilatory maneuver in bad faith, it is an abuse of discretion to deny such a motion." *Howey*, 481 F.2d at

1190-91. Here, Union Oil has not asserted, nor has the district court found, that the amendment was frivolous or made in bad faith. General considerations of judicial economy also justify allowing the amendments. The violations included in the proposed amendment relate to the same subject matter as the original complaint. Allowing the amendment will further the federal policy of "wrapping in one bundle all matters concerning the same subject matter." *Rosenberg Bros. v. Arnold*, 283 F.2d 406 (9th Cir.1960) (per curiam). For all of these reasons, we reverse the district court's denial of Sierra Club's motion for leave to amend. Sierra Club should be allowed to amend to include all violations except for the five about which it knew or should have known when it filed the original complaint.

CONCLUSION

We remand to the district court for the purpose of determining whether the alleged February 1983 biochemical oxygen demand violation and the alleged December 1981 oil and grease violation in fact occurred. The district court's finding of no liability for the other seventy-four exceedances alleged in the original complaint is reversed and the case is remanded for determination of penalty. The district court's denial of leave to amend the complaint is reversed, except as to violations about which Sierra Club knew or should have known when it filed the original complaint.

Affirmed in part; reversed in part; and remanded. Appellant is entitled to costs.

Appendix B

United States Court of Appeals
for the Ninth Circuit

No. 85-2868

Sierra Club, a California non-profit corporation,
Plaintiff-Appellant,

vs.

Union Oil Company of California,
a California corporation, et al.,
Defendants-Appellees.

[Filed Aug. 20, 1987]

ORDER

Before: CHOY, GOODWIN, and PREGERSON, Circuit Judges.

The panel as constituted above voted to deny the petition for rehearing. Judges Goodwin and Pregerson voted to reject the suggestion for rehearing en banc and Judge Choy so recommends.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

Appendix C

United States District Court
Northern District of California
No. C-84-3435 SC

Sierra Club, a California non-profit corporation,
Plaintiff,

vs.

Union Oil Company of California,
a California corporation, et al.,
Defendants.

[Filed Nov. 5, 1985]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action came on regularly for court trial, without a jury, on October 28, 1985, and lasted for five days. The issues as to liability and damages were bifurcated, with the trial period being concerned with liability only.

The parties herein are: plaintiff Sierra Club, and defendant Union Oil Company of California.

Evidence, both oral and documentary, was introduced on behalf of the parties, and the cause having been submitted for decision on the bifurcated issue of liability, the court, having considered the evidence and pleadings of record, and being fully advised of the premises, makes the following Findings of Fact and Conclusions of Law.

This action is a citizen suit brought under Section 505 of the Clean Water Act, 33 U.S.C. § 1365(a). Plaintiff Sierra Club seeks an injunction and civil penalties against defendant Union Oil for alleged violations of Sections 301 and 402 of the Act, 33 U.S.C. §§ 1311, 1342. Plaintiff alleges that defendant discharged pollutants into San Pablo Bay in violation of effluent limitations established for such pollutants in the National Pollutant Discharge Elimination System (NPDES) permit which covers such discharges.

The violations claimed allegedly occurred during the period June, 1979 through December, 1983, and were allegedly disclosed in Self-Monitoring Reports (SMR's) filed by Union Oil with the San Francisco Bay Regional Water Quality Control Board ("RWQCB").

Union Oil's defense is that the certain alleged violations were not even permit exceedances, much less violations of the permit, that others were excusable as upsets due to two exceptional winter storm years.

Union Oil operates its San Francisco Refinery in Contra Costa County, California, near Rodeo. Pursuant to a National Pollutant Discharge Elimination System ("NPDES") permit issued by the California Regional Water Quality Control Board, Union Oil discharges wastewaters, including process wastewater and storm water runoff, to San Pablo Bay, a navigable waterway.

The initial NPDES permit was adopted on November 19, 1974, as Order No. 74-152. Changes were made to that permit by Order No. 77-148 adopted on December 20, 1977, and by Order No. 79-125 adopted on October 16, 1979. With the exception of the changes made by Order No. 77-148 and Order No. 79-125, Order No. 74-152 remained in effect until March 1, 1980. A revised NPDES permit was adopted on February 19, 1980, as Order No. 80-5. That permit was modified by Order No. 80-45 adopted on September 16, 1980. Order No. 80-5, or Order No. 80-5 as amended by Order No. 80-45, was effective from March 1, 1980, until March 3, 1985. The current NPDES permit was adopted on February 20, 1985, as Order No. 85-29. That permit became effective on March 3, 1985. Union Oil was the sole named permittee from 1974 to March 1, 1980, and from March 3, 1985, to the present.

At all relevant times, the NPDES permit in effect established effluent limitations on the wastewater discharged by Union Oil. The NPDES permit also required Union Oil to perform sampling and analysis of its wastewater, and to report any exceedances of effluent limitations.

At issue in this lawsuit are 75 incidents which Sierra Club alleges represent violations of permit limitations or conditions. A

few of the said 75 are termed monthly exceedances, in certain of the instances; an exceedent in one month can affect the monthly average which would amount to an additional exceedant charge; however, the "actual exceedant" violations were less than 75.

Union Oil discharges wastewater at two points—at a point located near monitoring station E-001 and at a point located near monitoring station E-004. The wastewater discharged through monitoring station E-001 typically consists solely of once-through non-contact cooling water which is taken from San Pablo Bay and then returned to San Pablo Bay after being used for cooling purposes. Waste discharged through monitoring station E-004 also includes non-contact cooling water. In addition, the E-004 wastewater includes wastewater treated in the wastewater treatment plan (which is known as Unit 100) and storm water runoff from some areas of the refinery property and from areas surrounding the refinery property.

Union Oil's wastewater treatment plant—Unit 100—receives water in two separate waste streams. The first waste stream is a segregated process wastewater stream containing relatively high concentrations of organic constituents, including phenols. After cooling, the segregated waste stream is initially routed to a trickling filter at Unit 100 where it receives initial biological treatment. Prior to late December, 1982, the segregated stream was then routed to the primary activated sludge tank where it received further biological treatment. Since late December, 1982, this segregated stream has been routed from the trickling filter to a secondary activated sludge tank before being routed to the primary activated sludge tank. At all times, wastewater from the primary activated sludge tank has been routed to a clarifier, and eventually through E-004 to San Pablo Bay.

The second waste stream is an unsegregated waste stream which consists of process water combined with storm water runoff. The unsegregated waste stream is routed to Unit 100 in the refinery combined sewer system. The unsegregated waste stream first enters an API separator at Unit 100 which relies on gravity separation to remove oil and solids from the wastewater. Union Oil contends that the API separator has a design capacity of at least 7,000 gallons per minute. After treatment in the API,

the unsegragated stream is routed to a dissolved air flotation ("DAF") unit. The DAF removes additional oil and solids by a chemical coagulation and flotion process. Water from the DAF outlet is channelled to feed pumps for the primary activated sludge tank where it is combined with the treated segregated wastewater stream and pumped to the primary activated sludge tank. Union Oil has established that the primary activated sludge clarifier system ("bioplant") was designed normally to treat combined segregated-unsegregated wastewater streams of up to 2,500 gallons per minute. During period when stormwater runoff or unsegregated wastewater causes the capacity of the bioplant to be exceeded, the excess unsegregated wastewater is designed to be routed around the bioplant after receiving treatment in the API Separator and DAF. The entire segregated wastewater stream normally is treated in the bioplant, even when excess unsegregated wastewater is being routed around the bioplant. When design routing of excess wastewater occurs, the excess wastewater is combined with wastewater treated in the bioplant before entering monitoring station E-002, the principal location where water is sampled to determine whether effluent limitations are being met.

The wastewater treatment plant is designed so that the wastewater streams may be diverted from various locations upstream, within, and downstream of the wastewater treatment plant to two storm basins, the main storm basin and the primary storm basin. The storm basins are also used to store excess wastewater generated during rainstorms for treatment after the rainstorm has abated. The two storm basins have a combined capacity of approximately 9.5 million gallons. The wastewater in the storm basins may then be pumped back into the wastewater treatment plant for treatment.

This case is not the situation where a refiner has been charged with exceedants of its permit that it did not report, either deliberately or through negligence, but, rather, it is a case where the refiner did report its exceedants and complied with the regulations pursuant to reporting the incidents and the giving of its reasons therefor. Here the plaintiff maintained that even though the defendants reported the exceedants, they are still in

fact violations for which defendant is liable, and that defendant has no defenses to said violations. The defendant countered with the fact that it did report and comply, and that it has valid reasons and explanations to said exceedants; therefore, its "upset" defenses and explanations are valid defenses and prove no liability on the part of the defendant.

"Upset" means an exceptional incident in which there is unintentional and temporary noncompliance with technology based permit effluent limitations because of factors beyond the reasonable control of the permittee. 40 C.F.R. § 122.41(n).

In reviewing the evidence, the court finds and concludes that the upset defense is available to defendant in this case, and further finds that the evidence proves that the exceedants alleged by plaintiff are excusable as upsets.

The period in question covers 52 months from June, 1979, through December, 1983, and during said period defendant was required to submit to the Regional Water Quality Control Board approximately 300 separate testing and observations reports per month, or a total of approximately 16,000 reportings. The reports are submitted on a self-monitoring program. Of said 16,000 reporting items that could cause exceedants (violations), the plaintiff claims 75 exceedants during said 52 month period. (The actual number of exceedants is less than 75, because one weekly violation can generate a monthly violation (as aforesaid); therefore, one reported violation can count for two violations.

The following chart indicates the alleged number of violations by month and year:

ALLEGED NUMBER OF VIOLATIONS BY MONTH AND YEAR

	1979	1980	1981	1982	1983
January		—	2	4	1
February		1	—	—	3
March		—	—	6	3
April		2	1	15	—
May		—	—	—	—
June	—	—	1	—	—
July	—	—	—	—	1
August	—	—	—	—	—
September	—	—	—	—	2
October	—	—	1	—	2
November	2	1	2	9	—
December	1	1	5	8	1
TOTALS	3	5	12	42	13

The chart indicates three exceedants in 1979, five in 1980, then the heavy and extraordinary rains of the winters of 1981-1982 and 1982-1983, caused most of the exceedants at issue.

As aforesaid, during the 1979 through 1983 time frame, Union Oil performed more than 16,000 tests monitoring the constituents contained in its effluent. Less than one half of one percent of those monitoring results formed the subject of this trial. Of those 75 alleged violations, Union Oil presented evidence that thirteen were not even actual exceedances of permit limitations, because the applicable permit limitation either was not exceeded, or because the result was cause by error in wastewater sampling or analysis. Union Oil admitted that the remaining 62 alleged violations were, in fact, permit exceedances reported to the Regional Board by Union Oil. But Union Oil presented evidence that 50 of those exceedances were related to abnormally heavy rainfall occurring, for the most part, during the winters of 1981 to 1982, and 1982 to 1983. The remaining twelve exceedances were attributed by Union Oil to temporary malfunctions of treatment or process equipment, or by an unusual operations failure.

The court finds that the winters of 1981 to 1982 and 1982 to 1983 produced exceptionally heavy rainfall, causing widespread flooding and property damage.

In the six month period between November 1981, and April 1982, the defendant experienced an exceptional rainfall of 33 inches, which represented a rainfall that occurs once in a hundred years. In the following rain season (1982-1983), defendant experienced another 33 inch rainfall, which represented a rainfall that occurs once in a hundred years. Therefore, there were two hundred-year rainfalls in sequence.

The above chart of incidents clearly pinpoints the reasonableness of defendant's contentions as to rainfall and overall compliance record. No incident was of such magnitude to justify an exceptional exceedance as to require liability. The reasons proved by defendant justified the non-liability of such exceedance.

The court finds that the rainfall related permit exceedances were caused by factors beyond the reasonable control of Union Oil and are, therefore, excusable as "upsets" within the meaning of 40 C.F.R. § 122.42(n).

Exceedances attributable to temporary malfunctions of equipment also qualify as "upsets" within the meaning of 40 C.F.R. § 122.42(n). Permit limitations are based on the availability of technology to remove the constituents identified in the permit. The evidence at trial revealed that the wastewater treatment plant at Union Oil consisted of equipment which met acceptable practicable control technology standards and which had sufficient capacity to meet permit limitations under all but the most severe circumstances. The evidence establishes that the few exceedances attributed to equipment malfunction were beyond the reasonable control of Union Oil.

Finally, a few exceedances (minor in magnitude), during the five-year period at issue, were caused by very unusual human errors that are excusable in light of time span and number of acceptable readings.

The sum of the credible evidence demonstrates that the 75 exceedances were caused by factors beyond the reasonable control of Union Oil, thereby qualifying as "upsets", and/or excusable reasons and establish no liability on the part of defendant.

Plaintiff has not sustained its burden of proof.

CONCLUSIONS OF LAW

1. This court has jurisdiction over the parties and the subject matter of this action under the Citizen Suit provision of the Clean Water Act, 33 U.S.C. § 1365, and venue is proper in this court.

2. Union Oil is obligated to comply with the terms, conditions, and effluent limitations contained in its NPDES permit, however, it is not responsible for "an exceptional incident in which there is unintentional and temporary non-compliance with technology-based permit effluent limitations because of factors beyond [its] reasonable control . . . " 40 C.F.R. § 122.41(n).

3. The "upset" defense is available to Union Oil, even though its NPDES permit itself contains no upset provision because federal law requires the inclusion of upsets in all federally-issued permits, *Marathon Oil Co. v. EPA*, 565 F.2d 1253 (9th Cir. 1977), and California law requires application of the federally-mandated provisions unless the state makes specific findings regarding the "water quality" necessity for imposing more stringent requirements. California Water Code Section 13377; *Southern California Edison Co. v. State Water Resources Control Board*, 116 Cal. App. 3d 751 (1981). The state has made no such "water quality" necessity findings with respect to the permit issued to Union Oil.

4. Since the exceedances alleged by plaintiff are excusable as upsets, defendant is entitled to a judgment in its favor dismissing this action with prejudice.

5. Judgment is rendered in favor of defendant Union Oil against plaintiff Sierra Club, and defendant is entitled to its costs.

Dated: November 5, 1985.

/s/ SAMUEL CONTI
United States District Judge

Appendix D

United States District Court
Northern District of California
No. C-84-3435 SC

Sierra Club, a California non-profit corporation,
Plaintiff,

vs.

Union Oil Company of California,
a California corporation,
Defendant.

[Filed Nov. 5, 1985]

JUDGMENT

It is hereby ordered, adjudged and decreed that judgment shall be entered in favor of defendant Union Oil Company of California and against plaintiff Sierra Club, in accordance with the Findings of Fact and Conclusions of Law entered by the court herein. It is further ordered that defendant shall recover its costs of suit.

Dated: November 5, 1985.

/s/ SAMUEL CONTI
United States District Judge

Appendix E

§ 1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

(b) Timetable for achievement of objectives

In order to carry out the objective of this chapter there shall be achieved—

> (1)(A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 1314(b) of this title, or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 1317 of this title; and
>
> * * * *

(e) All point discharge source application of effluent limitations

Effluent limitations established pursuant to this section or section 1312 of this title shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this chapter.

§ 1318. Records and reports; inspections

(a) Maintenance; monitoring equipment; entry; access to information

Whenever required to carry out the objective of this chapter, including but not limited to (1) developing or assisting in the development of any effluent limitation, or other limitation, prohibition, or effluent standard, pretreatment standard, or standard of

performance under this chapter; (2) determining whether any person is in violation of any such effluent limitation, or other limitation, prohibition or effluent standard, pretreatment standard, or standard of performance; (3) any requirement established under this section; or (4) carrying out sections 1315, 1321, 1342, 1344 (relating to State permit programs), and 1364 of this title—

(A) the Administrator shall require the owner or operator of any point source to (i) establish and maintain such records, (ii) make such reports, (iii) install, use, and maintain such monitoring equipment or methods (including where appropriate, biological monitoring methods), (iv) sample such effluents (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe), and (v) provide such other information as he may reasonably require; and

(B) the Administrator or his authorized representative, upon presentation of his credentials—

(i) shall have a right of entry to, upon, or through any premises in which an effluent source is located or in which any records required to be maintained under clause (A) of this subsection are located, and

(ii) may at reasonable times have access to and copy any records, inspect any monitoring equipment or method required under clause (A), and sample any effluents which the owner or operator of such source is required to sample under such clause.

§ 1319. Enforcement

(a) State enforcement; compliance orders

(1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any condition or limitation which implements section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title in a permit issued by a State under an approved permit program under section 1342 or 1344 of this title he shall proceed under his authority in paragraph (3) of this subsection or he shall notify the person in alleged violation and such State of such finding. If beyond the thirtieth

day after the Administrator's notification the State has not commenced appropriate enforcement action, the Administrator shall issue an order requiring such person to comply with such condition or limitation or shall bring a civil action in accordance with subsection (b) of this section.

* * * *

(b) Civil actions

The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State.

* * * *

(d) Civil penalties

Any person who violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator, or by a State, or in a permit issued under section 1344 of this title by a State, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $10,000 per day of such violation.

§ 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and

1343 of this title, or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

* * * *

(b) State permit programs

At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which—

(A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title;

* * * *

(2)(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title;

* * * *

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

(d) Notification of Administrator

(1) Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.

(2) No permit shall issue (A) if the Administrator within ninety days of the date of his notification under subsection (b)(5) of this section objects in writing to the issuance of such permit, or (B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this chapter. Whenever the Administrator objects to the issuance of a permit under this paragraph such written objection shall contain a statement of the reasons for such objection and the effluent limitations and conditions which such permit would include if it were issued by the Administrator.

(3) The Administrator may, as to any permit application, waive paragraph (2) of this subsection.

(4) In any case where, after December 27, 1977, the Administrator, pursuant to paragraph (2) of this subsection, objects to the issuance of a permit, on request of the State, a public hearing shall be held by the Administrator on such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after completion of the hearing, or, if no hearing is requested within 90 days after the date of such objection, the Administrator may issue the permit pursuant to subsection (a) of

this section for such source in accordance with the guidelines and requirements of this chapter.

* * * *

(k) Compliance with permits

Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1312, 1316, 1317, and 1343 of this title, except any standard imposed under section 1317 of this title for a toxic pollutant injurious to human health. Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) section 1311, 1316, or 1342 of this title, or (2) section 407 of this title, unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. For the 180-day period beginning on October 18, 1972, in the case of any point source discharging any pollutant or combination of pollutants immediately prior to such date which source is not subject to section 407 of this title, the discharge by such source shall not be a violation of this chapter if such a source applies for a permit for discharge pursuant to this section within such 180-day period.

California Water Code

§ 13268. Failure to furnish or falsity in technical or monitoring program reports; offense; civil liability; exception

(a) Any person filing or refusing to furnish technical or monitoring program reports as required by subdivision (b) of Section 13267, or falsifying any information provided therein, is guilty of a misdemeanor and may be liable civilly in accordance with subdivision (b).

(b)(1) Civil liability may be administratively imposed by a regional board in accordance with Article 2.5 (commencing with Section 13323) of Chapter 5 for a violation of subdivision (a) in

an amount which shall not exceed one thousand dollars ($1,000) for each day in which the violation occurs.

(2) Civil liability may be imposed by the superior court in accordance with Articles 5 (commencing with Section 13350) and 6 (commencing with Section 13360) of Chapter 5 for a violation of subdivision (a) in an amount which shall not exceed five thousand dollars ($5,000) for each day in which the violation occurs.

Appendix F

§ 122.41 Conditions applicable to all permits (applicable to State programs, see § 123.25).

* * * *

(n) *Upset—(1) Definition.* "Upset" means an exceptional incident in which there is unintentional and temporary noncompliance with technology based permit effluent limitations because of factors beyond the reasonable control of the permittee. An upset does not include noncompliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation.

(2) *Effect of an upset.* An upset constitutes an affirmative defense to an action brought for noncompliance with such technology based permit effluent limitations if the requirements of paragraph (n)(3) of this section are met. No determination made during administrative review of claims that noncompliance was caused by upset, and before an action for noncompliance, is final administrative action subject to judicial review.

(3) *Conditions necessary for a demonstration of upset.* A permittee who wishes to establish the affirmative defense of upset shall demonstrate, through properly signed, contemporaneous operating logs, or other relevant evidence that:

(i) An upset occurred and that the permittee can identify the cause(s) of the upset;

(ii) The permitted facility was at the time being properly operated; and

(iii) The permittee submitted notice of the upset as required in paragraph (1)(6)(ii)(B) of this section (24 hour notice).

(iv) The permittee complied with any remedial measures required under paragraph (d) of this section.

(4) *Burden of proof.* In any enforcement proceeding the permittee seeking to establish the occurrence of an upset has the burden of proof.

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 87-852

In The
Supreme Court of the United States
October Term, 1987

UNION OIL COMPANY OF CALIFORNIA,
Petitioner,

v.

SIERRA CLUB,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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18 pp

QUESTIONS PRESENTED

1. Did the Ninth Circuit err in holding that Union Oil Company was not entitled to rely upon an upset defense to violations of its wastewater discharge permit, when the state permitting agency had expressly excluded such a defense from the permit and Union Oil did not exhaust state administrative remedies before asking the district court to insert such a defense in its permit?

2. Did the Ninth Circuit err in holding that Union Oil was not entitled to contest, on the basis of alleged sampling and testing errors, the validity of its own self-monitoring reports admitting these permit violations?

3. Does any of these questions pose an issue of sufficient legal or factual significance to warrant review by this Court?

RULE 28.1 LISTING

Respondent Sierra Club has no parent companies, subsidiaries or affiliates.

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LEGISLATIVE HISTORY

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No. 87-852

In The
Supreme Court of the United States
October Term, 1987

UNION OIL COMPANY OF CALIFORNIA,
Petitioner,

v.

SIERRA CLUB,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent Sierra Club opposes the petition for certiorari to review the Ninth Circuit's reversal of the district court's judgment.

STATEMENT OF THE CASE

This action was brought under Section 505 of the Clean Water Act, 33 U.S.C. § 1365, to enforce the terms of a wastewater discharge permit issued to petitioner by the

State of California.[1] In the district court, respondent presented uncontroverted evidence that petitioner's own self-monitoring reports showed that certain discharges had exceeded the limitations in the permit.[2] Nevertheless, the district court excused most of these violations as "upsets" because they occurred during periods of heavy rainfall. Pet. App. at 31-32.[3] Although the permit contained no "up-

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1 California has adopted its own system for permitting wastewater discharges in the form of the Porter-Cologne Water Quality Control Act, set forth in California Water Code Sections 13000 *et seq.*, and specifically Sections 13370-13389. On this basis, the federal Environmental Protection Agency ("EPA") delegated to California the authority to administer the Clear Water Act's National Pollution Discharge Elimination System ("NPDES") in California. *See* 33 U.S.C. § 1342(b). NPDES permits are issued by the State's Regional Water Quality Control Boards. *See* Cal. Water Code § 13377. The state-issued permits must contain effluent standards at least as strict as those promulgated by EPA, but may contain more stringent pollution control standards. 33 U.S.C. § 1370; 40 C.F.R. §§ 122.1(f), 123.1(i), 123.25(a).

2 California law provides that permit compliance will be monitored and reported by the discharger; that the discharger operating under a state permit must install, use and maintain monitoring equipment and must sample its effluents; and that the discharger must report the results of that monitoring to the state permit-issuing agency in a self-monitoring report at intervals which are to be specified in the permit. *See* Cal. Water Code §§ 13225(b), 13267(b), 13268, 13383, 13387(b); 23 Cal. Admin. Code §§ 2235 *et seq.* This is consistent with the approach taken in the Clean Water Act for the NPDES program. *See* 33 U.S.C. § 1318(a)(4)(A); 40 C.F.R. § 122.41(l)(4).

3 References to the opinions below will be made to the pages in the appendices to the petition. Also, in this brief, documents in the record on appeal will be referred to by the docket numbers in the district court Clerk's Record ("CR"), the Reporter's Transcript of the trial is cited as "RT", and plaintiff's and defendant's trial exhibits are cited as "Pl.Tr.Ex." and "Def. Tr.Ex.".

set defense," the district court held that California law required that it be read into this *state-issued* permit because federal law requires its inclusion in *federally-issued* permits. *Id.* at 33.

The Ninth Circuit disagreed, but not for the reasons which petitioner assigns for review by this Court. The Ninth Circuit held that an upset defense was not available because the permit did not contain one, because the States may set more stringent permit limits by omitting the federal upset defense, because the State of California had done so here by not incorporating the upset defense in the permit explicitly or by reference, and because petitioner's failure to raise these issues before the state permitting agency or in an action to review the terms of the permit barred it from raising these issues in an enforcement proceeding. Pet. App. at 9-14.

Thus, petitioner is simply wrong in asserting that the Ninth Circuit denied petitioner an upset defense because it "interpreted the Clean Water Act to prohibit permit exceedences due to an unsual event where the unusual event is likely to occur over the life of a plant." Pet. at 9. Nor is it correct to state that "[t]his understanding of the law lies at the core of the Court's decision" denying to petitioner an upset defense. *Id.*

Regardless of the merits of *that question*, the Ninth Circuit determined *in this case* that as a matter of state law petitioner was not entitled to assert an upset defense. It then considered as an alternative ground for its holding whether petitioner had in this case met the specific requirements of the upset defense promulgated in the EPA regulations. It was only in this context that the court ex-

amined the capacity of petitioner's treatment facility to determine whether it was adequately designed to handle "unusual rains." Pet. App. at 17. Even then, the Ninth Circuit was simply construing the EPA regulations, which preclude reliance on the federal upset defense for violations resulting from "improperly designed" or "inadequate treatment facilities." 40 C.F.R. § 122.41(n)(1). Moreover, this particular factor was only one among a number of independent criteria that the court determined petitioner had failed to meet as a prerequisite to complying with the federal regulations.[4]

Nevertheless, in this Court, petitioner portrays itself as the victim of "vicious," "killer" storms, which on one occasion even produced "a rare snowfall to nearby Mt. Diablo." Pet. at 5. Beyond such anecdotes, the fact is that at trial petitioner's expert admitted that he could not ascribe any violations to a drop in temperature[5] and that only a hydrologist could evaluate properly the relative magnitude of these storms.[6] The only hydrologist at the

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[4] Although the district court read the federal upset defense into petitioner's state permit, it never bothered to determine whether petitioner had met the specific requirements of that defense in the EPA regulations, 40 C.F.R. § 122.41(n). In reversing the district court's decision on this alternative ground, the Ninth Circuit meticulously reviewed the hypothetical application of the federal regulation to this case. It found that the district court had erred in applying the upset defense (i) to exceedances of permit limitations which were based on the quality of the receiving water rather than the technology used, (2) to operator errors, (3) to inadequate facilities, and (4) to exceedances for which petitioner had failed to comply with the specific procedural requirements of the federal upset regulation. Pet. App. at 14-18.

[5] RT 525-6. In fact the temperature of the plant's influent never dropped below its design specifications. RT 618.

[6] RT 510.

trial testified that in these two winter seasons *no* monthly total rainfall (relevant to monthly average violations), and only *one* daily total rainfall (relevant to daily maximum violations), was greater than what could be expected every five years.[7] Indeed, petitioner has shown itself incapable of complying with its permit even in the driest weather.[8]

Finally, for seven permit violations, petitioner is unhappy with the Ninth Circuit because it refused to allow petitioner to impeach its own self-monitoring reports. Peti-

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[7] RT 637-652; Pl.Tr.Exs. 33 and 34; Union Oil's Response to Sierra Club's Interrogatory No. 52. The district court did not reach a different conclusion, since it decided to exempt petitioner from any violations for the entire six months of each of these two winters, because the *six month totals* of rainfall were high. Pet. App. at 32. In this respect, the district court simply ignored the fact that the permit parameters violated were not six-month averages but *daily* maximum concentrations of pollutants and *monthly* averages.

[8] During the four years preceding the winter of 1981-82, petitioner reported 54 violations of its permit. CR 183 at Exh. B, pp. 1, 3-6, and Def.Tr.Ex. X. From December 1982 to April 1986 (when respondent filed its opening brief on appeal) petitioner had reported 85 more violations. CR 183, App. B, p.2; Def.Tr.Ex. X; public files of Regional Board (Evid. Rule 201(b)(2)). In fact, petitioner's performance since December 1982 has been so poor that the Regional Water Quality Control Board issued a Cease and Desist Order requiring construction of a larger treatment facility and requested that the California Attorney General prosecute Union Oil for civil penalties and injunctive relief. *See* Addenda C and D to Sierra Club's Opening Brief on Appeal. For these reasons, this Court's recent decision in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 56 U.S.L.W. 4017 (December 1, 1987), does not require any further consideration of whether respondent made good faith allegations in its complaint of continuing permit violations by petitioner. In fact, even prior to petitioner's many recent violations, the district court specifically determined that respondent had alleged continuing permit violations by petitioner. *Sierra Club v. Union Oil Co.*, 15 E.L.R. 20890, 20891 (N.D. Cal. 1985).

tioner does not dispute that it reported exceedances in these instances. Rather it sought below to discredit them as "apparently the result of sampling errors," or as not showing "meaningful analytical results," or as an "anomaly."[9] The Ninth Circuit accepted the position of EPA as *amicus curiae* that to allow the discharger *post hoc* to impeach its own self-monitoring reports would undermine the entire permit enforcement scheme. Pet. App. at 20-21; U.S. Br. at 26-28.

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[9] Debuse Declaration ¶¶ 46, 48, 70 [CR 46]. The evidence in the district court did not support these contentions. With respect to three of these violations, the *contemporaneous* reports prepared by petitioner's employees concluded that the cause of these violations was "unknown", rather than positively concluding that they were sampling or testing errors, as petitioner now asserts. Def.Tr.Ex. F (3/31/83 and 4/5/83) memos). In its brief to the Ninth Circuit, petitioner also attempted to excuse two TOC violations by citing statistical evidence based on the extraordinary premise that reported violations must be in error whenever they fall outside the statistical range of values obtained when the permit was not violated (Br. at 10, citing RT 247 and Def.Tr.Exs. D and E). In any event, the evidence in the trial court showed that petitioner's statistical range (expressed in net values: effluent values minus influent values) had been skewed by the use of a dirty influent sample bottle. RT 371, 581-2; Pl.Tr.Ex. 9. Finally, petitioner asserted in its brief to the Ninth Circuit that two other violations resulting from its failure to report any sample results should be excused because "meaningful results could not be obtained from these samples" (Br. at 8). But petitioner's witnesses agreed with respondent's expert that its failure to report values for these samples could be due to a "chemist's error." RT 572, 376.

REASONS FOR DENYING THE WRIT

1. As petitioner itself concedes, the Ninth Circuit reversed the district court's allowance of an upset defense "because they interpreted differently *the effect of a state law.*" Pet. at 13 (emphasis added). The Ninth Circuit held that California's more stringent water quality law did not allow the upset defense to be "read into" this *state-issued* permit simply because it was required in a *federally-issued* permit. Pet. App. at 12-14. Since this Court's "general practice is to place considerable confidence in the interpretations of state law reached by the federal courts of appeals,"[10] this case does not present the usual occasion for invoking this Court's plenary review. Indeed, petitioner does not point to any error in the Ninth Circuit's conclusions regarding state law.

2. Petitioner cannot brush aside this construction of state law by asserting that "the requirements of the Clean Water Act" are controlling. Pet. at 13. The only provision of the Clean Water Act of relevance here is Section 510's undeniable grant of authority to States to set more stringent standards than those under federal law.[11] Yet, petitioner never argues that California's exclusion of the upset defense in this permit was an abuse of its authority to set more stringent standards. The granting of certiorari would thus be inappropriate because, as this Court observed in another context:

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[10] *Pacific Gas and Electric Company v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190, 214 (1983). *See also Mills v. Rogers*, 457 U.S. 291, 306 (1982); *Bishop v. Wood*, 426 U.S. 341, 346 (1976).

[11] 33 U.S.C. § 1370; *see Environmental Protection Agency v. California*, 426 U.S. 200, 218 (1976) ("Section 510 quite plainly was intended to strengthen state authority.")

> "[I]t would be particularly pointless for us to engage in such inquiry here when it is clear that the States have been allowed to retain authority . . . . In these circumstances, it should be up to Congress to determine whether a State has misused the authority left in its hands."[12]

3. Moreover, the Ninth Circuit's decision is in accord with EPA's regulations, which specifically authorize the States to exclude the upset defense from their permits, in recognition of their authority to set more stringent standards. *See* Pet. App. at 5-6 (citing the note to 40 C.F.R. § 123.25(a)). Again, petitioner never suggests that this Court review whether *EPA's construction* of the Clean Water Act is unreasonable and contrary to Congressional intention—the only circumstance which would justify any departure from the "considerable deference" accorded by this Court to EPA's construction of the Act.[13]

4. There is an even more fundamental reason why the petition must be denied: petitioner failed to exhaust the administrative remedies available for seeking inclusion of an upset defense in its permit. Over twelve years ago, the State expressly declined petitioner's request that an upset defense be included in its permit. Petitioner never sought judicial review of that ruling, never argued to the state agency that this ruling was in any way defective, and never sought, indeed, to get an upset defense included in its permit on the subsequent occasions when it was

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[12] *Pacific Gas and Electric Company v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190, 216 (1983). *See also id.* at 222-223.

[13] *Chemical Manufacturers Association v. Natural Resources Defense Council*, 470 U.S. 116, 125 (1985). *See also Environmental Protection Agency v. California*, 426 U.S. 200, 227 (1976).

issued. Although acknowledging that its failure to exhaust administrative remedies was one of the grounds of the Ninth Circuit's decision,[14] petitioner does not offer this as a reason for granting the writ and does not assert that the Ninth Circuit committed any error in this regard.[15]

5. Nor should this Court accept petitioner's invitation to decide *any* issue relating to an upset defense when the context for such review is a permit enforcement action and the permit itself contains no upset defense. Section 505(f)(6) of the Clean Water Act, which petitioner cites as the jurisdictional basis of this action (Pet. at 2-3), defines the subject of the suit as "a permit or condition thereof issued under section 1342 of this title," and the Act itself specifically prohibits challenges to the terms of a permit in an enforcement action. 33 U.S.C. § 1369 (b)(2).[16] Surely, this Court's plenary review is not

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[14] Pet. at 8 n.12. The Ninth Circuit detailed the "several administrative routes that [Union Oil] could have taken to protest the permit's terms," both when the permit was "issued and reissued." Pet. App. at 10. As the Court noted, on any of these occasions, petitioner could have sought modification of its permit from the state agency, could have requested that the EPA Administrator object to the failure to include an upset defense and could have sought review in the Court of Appeals of the EPA Administrator's failure to object to the permit's terms. *Id.* at 10-11. In fact, although the permit was reissued and amended several times after 1974, petitioner *never even requested* the inclusion of an upset defense.

[15] Even so, this application of the exhaustion doctrine is so clearly in accord with the decisions of this Court, that further review by this Court is unnecessary. *See, e.g., United States v. L. A. Tucker Truck Lines*, 344 U.S. 33, 37 (1952); *United States v. Ruzicka*, 329 U.S. 287, 292-293 (1946); *Unemployment Compensation Commission v. Aragon*, 329 U.S. 143, 155 (1946).

[16] In *Environmental Protection Agency v. California*, 426 U.S. 200, 222-224 (1976), this Court emphasized that such enforce-

(Continued on following page)

properly invoked for the purpose in effect of "amending" state-issued permits under the Clean Water Act.

6. In any event, the granting of certiorari would not redress petitioner's grievance in this case. Although petitioner acknowledges that the Ninth Circuit determined that it had not complied with the federal upset defense *even if it were applicable* (Pet. at 8 n.13), petitioner offers no argument that the Ninth Circuit erred in this alternative holding. And, petitioner does not suggest that this Court should itself undertake to re-examine the details of the violations and determine whether or not each of the several independent EPA criteria has been satisfied in the same meticulous way that the Ninth Circuit has already done. Thus, even if this Court were to reinstate the district court's amendment of petitioner's permit to include such a defense, the defense would remain inapplicable

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(Continued from previous page)

ment actions are to be decided according to the terms of the permit. In particular this Court noted that a suit against a permit holder will necessarily be brought under the definition in subsection 505(f)(6), that this subsection uniquely focuses on the water pollution standards or limitations *"as translated into the conditions of an NPDES permit"* (426 U.S. at 223, emphasis in original), and that the plaintiff in an enforcement action under this subsection must show "violation of the permit condition" (*id.*) whether those conditions arise from standards promulgated by EPA "or from stricter standards established by the State" (*id.* at 224).

Indeed, the principal case relied upon by petitioner, *Marathon Oil Company v. Environmental Protection Agency*, 564 F.2d 1253, 1273 (9th Cir. 1977) (Pet. at 7, 12), held that the upset defense must be contained within the body of *federally-issued* permits, precisely because enforcement actions are limited to the terms of the permit. As the Ninth Circuit pointedly observed, the *Marathon Oil* case was not an enforcement suit but an action for review of the EPA Administrator's decision to exclude the upset defense from a permit. Pet. App. at 10-11 n.4.

because the Ninth Circuit determined that its specific requirements had not been met. In these circumstances, this Court should decline to exercise its discretionary review.[17]

7. Finally, for seven violations, petitioner seeks review of the Ninth Circuit's refusal to allow petitioner to present *post hoc* evidence at trial impeaching its own self-monitoring reports of these permit violations. Petitioner's argument that it was thereby deprived of due process was obviously fashioned in an effort to pique this Court's interest; the argument was never made to the Ninth Circuit, even in the petition for rehearing.[18] However, none of the cases cited by petitioner suggests that there is any deprivation of due process in requiring a party to stand behind *its own* sampling and the reports that *it files* under penalty of perjury.[19] Where the enforcement system is entirely dependent on *self-monitoring* and is intended to be based on "a minimum of discretionary decision making or delay,"[20] as here, the Ninth Cir-

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[17] *See The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 183 (1959) (dismissing certiorari as improvidently granted since the proceedings below were maintainable on another ground); *cf. United States v. Hastings*, 296 U.S. 188, 193 (1935) (when decision below supported by another basis not subject to examination in this Court, review would represent "an expression of an abstract opinion").

[18] Petitioner thus simply ignores this Court's admonition that it will not pass on arguments not presented to the courts below. *See, e.g., United States v. Ortiz*, 422 U.S. 891, 898 (1975); *McCullough v. Kammerer Corp.*, 323 U.S. 327, 328-329 (1945).

[19] Nothing in petitioner's permit precludes it from immediately taking additional samples when it has reason to suspect error or from routinely taking split or dual samples to provide a basis for double checking its sampling.

[20] S. Rep. No. 414, 92nd Cong., 1st Sess. 64, *reprinted in* 1972 U.S. Code Cong. & Ad. News 3668, 3730.

cuit properly concluded that to allow petitioner to impeach its own sampling results at trial "would be sanctioning countless additional hours of NPDES litigation and creating new, complicated factual questions for district courts to resolve." Pet. App. at 21.[21] In this respect and others, the Ninth Circuit followed the position urged upon it by EPA as *amicus curiae*. U.S. Br. at 26-28.

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[21] In this case, as described *supra* at note 9, petitioner's assertions of self-monitoring errors were in fact not supported by the evidence.

CONCLUSION

The petition presents no occasion for this Court to resolve any conflict between the Ninth Circuit's decision and that of any other circuit, or of this Court, or EPA's construction of the Clean Water Act. It raises no issues of national significance in interpreting that Act because fundamentally the decision of the Ninth Circuit is based on its undisputed interpretation of state law, its unquestioned application of the doctrine of exhaustion of administrative remedies, and its acceptance of EPA's positions regarding the operation of the Act's enforcement system. The petition for certiorari should accordingly be denied.

Respectfully submitted,

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Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 87-852

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

UNION OIL COMPANY OF CALIFORNIA,
Petitioner,

VS.

SIERRA CLUB,
Respondent.

REPLY TO SIERRA CLUB RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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Sierra Club, in its opposition to Union Oil's petition for writ of certiorari, does not meet the first issue presented in Union Oil's petition. Instead, Sierra Club rewrites the first issue and then argues against the issue it presents. Sierra Club also misses the mark on Union Oil's second issue. Its arguments reinforce the need for plenary review by this Court.[1]

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[1] Union Oil recently filed a motion to defer consideration of its petition for writ of certiorari pending reconsideration of federal court jurisdiction over all or part of this case in light of *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 56 U.S.L.W. 4017 (1987). Because of the Court's subsequent request for this reply, Union Oil has deferred filing its motion to dismiss in United States District Court pending the outcome of Union Oil's petition for writ of certiorari.

A. Sierra Club Focuses On The EPA-Created Upset Defense Instead of Addressing Union Oil's Fundamental Statutory Issue Which Affects All Permittees Under The Clean Water Act.

1. The issue Union Oil raises is simple: does the Clean Water Act allow a permittee to be excused for exceeding its permit limits where extreme or unusual acts of nature caused the exceedance? Sierra Club chooses not to meet that issue, but instead revises the issue to address the EPA-created defense, found in 40 C.F.R. Section 122.41(n). Sierra Club fixes its argument, including six of its seven reasons for denying the writ, on the issue it substitutes for that raised by Union Oil. Union Oil, however, does not raise the issue or application of the EPA-created defense. Union Oil's question is broader: it goes to the scope of liability established by the Clean Water Act.[2]

2. The issue Union Oil raises is separate from and independent of the EPA-created defense in 40 C.F.R. Section 122.41(n). The EPA-created defense was established to address the operating failures that inevitably occur during normal conditions; the defense Union Oil raises goes to exceedances due to abnormal natural conditions.[3] The EPA-created upset defense does not

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[2] Union Oil conducted the case below relying on the EPA-created upset defense. It prevailed on that defense in the District Court and lost before the Court of Appeals. Upon further consideration, Union Oil realized that the issue in this case is more fundamental: the real issue is whether the Clean Water Act holds a permittee liable for extreme or unusual acts of nature. The EPA-created defense was not established to respond to this issue. (See paragraph 2 of Part A of this reply.) Therefore, regardless of the presence or absence of the EPA-created defense in this permit, the issue is whether the Clean Water Act excuses permit exceedances due to extreme or unusual acts of nature. Although that issue was not directly addressed below, it may be considered for the reasons stated in paragraphs 3 through 6 of this Part.

[3] EPA established the upset provisions of 40 C.F.R. Section 122.41(n) at the direction of the Court in *Marathon Oil Company v. Environmental Protection Agency*, 564 F.2d 1253 (9th Cir. 1977). The Court there reviewed EPA's "best practicable technology" regulations, which set standards based on the best performance achievable in normal

reach the unusual natural conditions; it does not identify or set requirements pertinent to the consequences of hurricanes, tornadoes, severe storms, droughts, earthquakes and other unusual natural events. Instead, it focuses on routine matters in daily operation, like preventive maintenance, operational error, and careless operation. 40 C.F.R. Section 122.41(n), reprinted at Pet. App. F.[4] Thus, the EPA-created defense is limited in scope and does not reach the situation here. Moreover, it is not the exclusive defense available under the Clean Water Act.[5]

3. Union Oil raises this issue in response to the decision of the Court of Appeals below. The United States Court of Appeals for the Ninth Circuit interprets the Clean Water Act to prohibit permit exceedances due to an unusual natural event, if the unusual natural event is likely to occur over the life of the plant.

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operations. Data reflecting poor performance due to unusual natural events, such as hurricanes or tornadoes, were generally discarded from consideration in setting best practicable technology standards. *See e.g.*, 40 Fed. Reg. 21946 col. 3 (May 20, 1975); 40 Fed. Reg. 21942, col. 1 (May 20, 1975). Even so, EPA's technological data showed that the standard it had set in the best practicable technology regulation at issue could not be achieved, even with the most exemplary performance under normal operating conditions, more than 97-99% of the time. Because EPA nevertheless required compliance 100% of the time, the Court found EPA exceeded its authority for establishing best practicable technology regulations under the Clean Water Act by requiring more than was achievable. EPA remedied this flaw in its regulation by establishing an upset provision for the best practicable technology regulations. EPA structured the upset provision as an affirmative defense to alleged permit violations.

[4] "Pet. App." refers to the appendix to Union Oil's petition for writ of certiorari. "Response" refers to Sierra Club's response in opposition to Union Oil's petition for writ of certiorari. In all other respects, this reply employs the same usages as the petition.

[5] To the extent that the EPA-created upset defense does apply to these kinds of rainfall events, the Court should grant certiorari, reverse the Court of Appeals' holding that the upset defense was unavailable to Union Oil, and find that the Court of Appeals' reversal of the District Court's findings of fact on whether Union Oil met the upset defense, constituted plain error.

Pet. App. at A-16 and A-17. Although the Court of Appeals' conclusion was submerged in a discussion of the EPA-created upset defense, this Court may nevertheless consider the resulting issue Union Oil raises because it is important, it is a legal issue, and the facts necessary to resolve this issue are not in dispute. *See e.g., Capital Cities Cable, Inc. v. Crisp,* 467 U.S. 691, 698-699 (1984); *Vance v. Terrazas,* 444 U.S. 252, 259 n.5 (1980). Furthermore, the issue fairly reflects the central circumstances in this case; extraordinary rainfall, consisting of two six-month winter seasons in a row, each constituting a hundred-year rainfall event, resulted in approximately fifty permit exceedances. These central circumstances fairly raise the question whether the Clean Water Act allows a permittee to be excused for exceeding its permit limits where extreme or unusual acts of nature caused the exceedance.

4. The issue is important because it may affect every permit under the Clean Water Act. According to the Court of Appeals' decision, permittees should design their pollution control systems to function normally despite extreme or unusual acts of nature, if those unusual events are likely to occur over the life of the facility. Most facilities operate in areas occasionally subject to extreme or unusual acts of nature which are likely to occur over the life of the facility. The east and gulf coasts suffer from hurricanes, the midwest from tornadoes, and the west coast is prone to earthquakes. All areas may experience exceptionally severe storms. If permittees do not design their facilities to accommodate the stresses of extreme or unusual natural conditions, they may be subject to enforcement action, civil or criminal.[6] 33 U.S.C. Section 1319. In such enforcement suits, permittees could not successfully defend on grounds that extreme or unusual acts of nature had caused the permit exceedances because, in the Court of Appeals' view, the problem would not be the extreme events, but the inadequacy of the facility to meet the extreme events. The potential liability for exceedances due to

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[6] The Clean Water Act provides criminal penalties, including imprisonment of responsible corporate officers, for willful or negligent violation of permit terms. 33 U.S.C. Section 1319(c).

extreme natural occurrences would thus fall on tens of thousands of permittees.

5. The issue is legal: it raises the intended scope of a permittee's liability under the Clean Water Act. The inquiry is whether Congress intended to impose absolute liability on permittees under the Clean Water Act, making them responsible for the consequences of extreme or unusual acts of nature. The inquiry may extend to interpretation of the permit terms, and the regulations on which those terms are based, to determine whether they seek to impose liability on permittees for extreme or unusual acts of nature. Even in this extension, the issue is one of legal interpretation.

6. The facts necessary to resolve this issue are not in dispute. The key fact is that there were exceptionally heavy and unusual rains which resulted in permit exceedances. Sierra Club suggests otherwise, Response at 4-5, but Sierra Club simply quarrels with the record. Both the District Court and the Court of Appeals agreed on this key fact. The District Court found "the winters of 1981 to 1982 and 1982 to 1983 produced exceptionally heavy rainfall, causing widespread flooding and property damage." Pet. App. at A-31. The Court of Appeals similarly characterized the rains as "heavy rainfall", "heavy rains", and "unusual rains". Pet. App. at A-16 and A-17. The Court of Appeals did not reverse the District Court on this factual finding; instead, it disagreed on whether Union Oil was liable for the consequences of the heavy and unusual rains.[7] Only Sierra Club still tries to argue that there were no unusual rains in the winters of 1981-82 and 1982-83; but Sierra Club is both wrong and too late.[8] The factual finding of

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[7] The Court of Appeals' disagreement with the District Court was predicated on a differing interpretation of the legal responsibilities and liabilities of permittees under the Clean Water Act. Had it been no more than a differing factual conclusion, the Court of Appeals would have committed plain error in reversing the District Court's finding of fact on causation.

[8] Sierra Club tries to minimize the severity of these rainstorms, neglecting to mention that its own expert testified on cross-examination that the winter season storms were hundred-year rainfall events:

exceptional or unusual rains is undisturbed; the question left for the Court is the legal question of a permittee's liability for the consequences of extreme or unusual natural occurrences.

B. Sierra Club Offers No Reason Why A Permittee May Not Introduce Evidence In Its Defense In A Clean Water Act Enforcement Suit, Except To Say It Would Complicate The Suit By Requiring The District Court To Determine The Facts; This Reason Does Not Overcome The Permittee's Constitutional Rights.

1. The Court of Appeals held the Clean Water Act bars a permittee from showing at trial that an exceedance reported in the permittee's self-monitoring report was an error. Pet. App. at A-20 and A-21. The Court so held even though the permittee reported the error, together with the exceedance, in its self-monitoring report. The Court of Appeals misinterpreted the law. The Clean Water Act neither states nor implies that an exceedance in a monthly monitoring report is conclusive evidence of a violation and may not be explained, rebutted or in any way disproved at trial. The Clean Water Act did not create such an irrebuttable

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> The Court: So what you are saying is that the rain for that six-month period was a rain that occurred once every hundred years?
>
> Question: Statistically that's right, isn't it, doctor?
>
> Answer: Yes. [5 Tr. at 614 (Dr. Schroeder)].

Sierra Club's attempt to tie the exceedances only to unusually severe daily storms, Response at 4-5, is also inappropriate because the stress of a season of storms on bacteria in a bioplant is cumulative. The bacteria do not have the capability to renew themselves every 24 hours. The fact that the winter season constituted a hundred-year rainfall event is far more significant for the operation of the bioplant than that the rain on any particular day was or was not itself unusual. It is the combined effect of the rain and cold that caused these problems. Although Sierra Club goes so far as to suggest the drop in temperature associated with the rains did not contribute to the violations, Response at 4, the witness to whose testimony Sierra Club refers in fact testified most clearly: "it's a given the water is going to be colder going to the bioplant during a rain storm. I am saying that it's also a given that reduced temperatures slow the rate of biological activity in a bioplant." 4 Tr. 526 (Dr. Stone).

presumption; if it did, it would violate due process. *See* Petition at 13-17.

2. Sierra Club responds by asserting that the monthly monitoring report is an admission, that a permittee may not impeach its own admission, and, therefore, that a ban on evidence holds no constitutional flaw. Sierra Club's reasoning does not support its conclusion, even if a monitoring report is viewed as an admission, because a party may introduce evidence to clarify or respond to an admission. *E.g., Albert Hanson Lumber Company v. United States,* 261 U.S. 581,589 (1923). The ban is not against including evidence, but against excluding evidence by establishing irrebuttable presumptions in the absence of compelling reasons. *E.g., United States v. Provident Trust Company,* 291 U.S. 272, 281-282 (1934).

3. Sierra Club's argument rests on erroneous facts. Sierra Club implies Union Oil did not stand behind its reports and sought to impeach them. To the contrary, Union Oil proved at trial what its monitoring reports stated on their face for five of the seven exceedances at issue: that the reported exceedances were invalid because of sampling errors or calculation variabilities.[9] The April 15, 1983 self-monitoring report, for example, noted two exceptionally high results and stated:

> "Both excesses were reported . . . on the following day. On each occasion, repeat samples a few hours later and the following day yielded results well within limits. All other measures and observations indicated our treatment plant was operating well and that our effluent was on grade. These settleable solids excesses were traced to sampling problems. We have taken steps to resolve these problems." [Def. Ex. D, reproduced in part in the appendix to this reply.]

Union Oil thus did not impeach its reports; instead, Sierra Club and the Court of Appeals deleted from consideration those parts

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[9] The other two reports do not indicate an exceedance at all, but instead report that meaningful sample results could not be obtained because of laboratory problems.

of the self-monitoring reports which explained the exceedances reported.

4. This issue is significant. The 65,000 permittees under the Clean Water Act file a self-monitoring report each month, reporting numerous measurements and samples. These hundreds of thousands of routine monthly monitoring reports, according to the Court of Appeals decision, constitute conclusive evidence against the permittee in court: those filing the reports are not to be permitted an opportunity to explain the circumstances of any errors in the testing or in the reporting. Denying a person his day in court is a classic deprivation of due process. It should not be implied as a requirement of the Clean Water Act, nor tolerated here.

Respectfully submitted,

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February, 1988.

Appendix

[UNION LETTERHEAD]

April 15, 1983 WNS-102

Regional Water Quality Control Board
San Francisco Bay Region
1111 Jackson Street, Room 6040
Oakland, California 94607

Attention Mr. Fred H. Dierker

Gentlemen:

Attached is the March 1983 monthly report on the Self-Monitoring Program for Union's San Francisco Refinery.

The Refinery was in compliance with all limits with the exception of two high settleable solids results for Station E-002, 8.8 ml/1-hr on March 1 and 1.3 ml/1-hr on March 28. The two high daily values resulted in a monthly average of 1.14 ml/1-hr, exceeding the monthly average limit.

Both excesses were reported to RWQCB on the following day. On each occasion, repeat samples a few hours later and on the following day yielded results well within limits. All other measures and observations indicated our treatment plant was operating well and that our effluent was on grade. These settleable solids excesses were traced to sampling problems. We have taken steps to resolve these problems.

The information contained herein is correct to the best of my knowledge and belief.

Very truly yours,

/s/ W. N. Stark
Manager

DMGinosar/lo
Attachment
cc: Environmental Protection Agency
bc: M. J. Dougherty/Dr. C. B. Scott
Messrs. G. O. Dyke/F. A. Swingle
Circulate: J. R. Dietzman
F. R. Bottomley
S. D. Smith
D. M. Ginosar
A. L. Felderman
D. W. DeBuse

STATION E-002
GRAB SAMPLES

Mo. Mar. Yr. 1983 Date	Sample Time	Flow Rate mgd	pH Units	Settleable Solids ml/1-hr.	Sulfide Total		Flow Rate Ave. 3 Sx. mgd	Oil & Grease				
								Time			Ave	Ave*
					mg/1	Kg/day		mg/1	mg/1	mg/1	mg/1	Kg/day
	6:00A	3.46	—	8.8				6:00A	8:00A	10:00A		
	10:00A	3.46		0.01								
1	8:25A	5.29			0.04	0.80	3.69	36.7	5.8	6.0	16.2	226
	9:00A	5.06		0.01								
3	—	—	—	—	—	—	—	—	—	—	—	—
	6:00A	2.30	—	0.03				6:00A	8:00A	10:00A		
9	2:15P	2.53			0.04	0.38	2.07	8.6	13.0	13.9	11.8	92
14	6:00A	6.91	7.1	0.01				6:00A	8:00A	10:00A		
16	11:00A	3.00	—	—	0.02	0.23	4.99	17.8	29.8	11.3	19.6	370
	6:00A	7.60	7.1	0.02				6:00A	8:00A	10:00A		
22	2:25P	4.61			0.02	0.34	6.69	23.4	8.8	8.4	13.5	342
	6:00A	2.45		1.30				6:00A	8:00A	10:00A		
	11:12A	2.76			0.02	0.21						
28	2:00P	—		0.02			2.27	9.2	10.7	9.7	9.9	85
29	1:00P	2.30		0.02								
No. of Samples			2	9	5						15	
Min.			7.1	0.01	0.02	0.21					9.9	85
Ave.			7.1	1.14	0.03	0.39					14.2	223
Max.			7.1	8.80	0.04	0.80					19.6	370

* Loading values calculated from average flow rate.